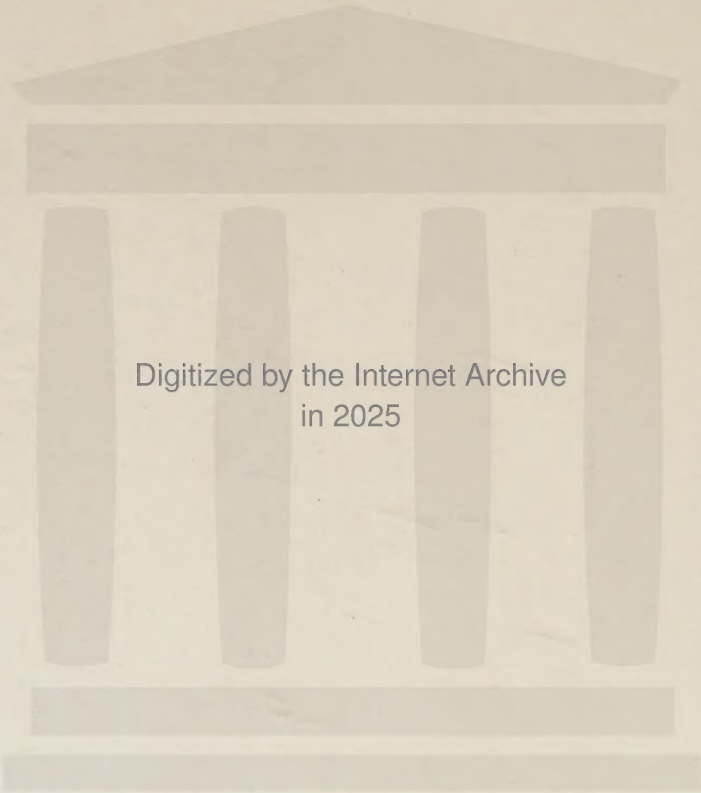
Commercial Law

PETERS
POMEROY



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Angelina Jvaristi
January 19, 1932.

COMMERCIAL LAW

(REVISED EDITION)

With Illustrative Cases, Problems, and Legal Forms

By

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PREFACE

This book is a revision of a former text on Commercial Law by one of the authors. Law is keeping pace with the constantly changing social and economic conditions. Recent legislation has changed the statutory and common law in a number of instances, thus making necessary certain important changes and improvements in the former editions. In this connection some of the previous material has been rearranged and reorganized, and where deemed desirable new material has been added.

The chapter on Automobile Negligence contains rules which might have been considered under the law of Agency and the law of Torts, but due to the increasingly important place of the automobile in our modern society, a separate treatment of it seemed justifiable. The scope of the chapter on Business Crimes has been broadened, and a chapter on Torts added, because it is believed that an appreciation of these subjects is as important to one interested in social control of business as the other topics commonly found in commercial law texts.

In the rearrangement of the material, an effort has been made to transpose portions in such a way as to make the whole better adapted for instructional purposes as well as for a clearer understanding by the student. The questions at the beginning of each chapter are purposely of a general nature, to be used as a stimulating guide to the sections immediately following. Throughout the task of revising this material, the valuable criticisms and suggestions of numerous teachers have been kept in mind and utilized when possible, in order to make this a more useful text.

P. B. S. P.
D. A. P.

June, 1928.

TO THE STUDENT

Laws are not made like nets—to catch,
But like sea-marks—to guide.
Sir Philip Sidney.

Commercial law is not a difficult subject,—it is an important subject. It has to do with the application of law to general business situations. There is nothing mysterious about law and the principles applicable thereto. It has been aptly said that law is nothing more than common sense, practically applied.

The authors of this book have tried to write a simple, practical, and understandable text-book. It follows, of course, that not all the law is crowded into this book, but many of the fundamental and vital principles are here. If these are mastered, it will be an achievement well worth the time and effort.

It has long been contended that prevention is more desirable than a subsequent cure. This truism will apply to the prevention of legal misunderstandings, as well as to the ills that affect the human body or the body politic. It is possibly true that "a little learning is a dangerous thing," but a little useful knowledge may often save much wasteful litigation. As society becomes more complex, the necessity for knowing one's rights, duties, and obligations correspondingly increases. It is needless to say that the successful business man cannot be too well informed to meet these rapidly changing situations.

There is not much that should be memorized in this book, but there is much that will stimulate clear and careful thinking. Some of the conclusions reached may be contrary to previously formed opinions (and wrong conceptions), but as progress is made in the study of the subject, with the application of the elements of law to concrete problems, a better appreciation will be had of its breadth and comprehensiveness —and its ultimate justice. It is the avowed purpose of law to do justice.

The study of law should inculcate and inspire a respect and reverence for law and constituted authority. Without such respect and reverence, the cherished and honored traditions and institutions of a republic may not long endure.

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THE UNITED STATES SUPREME COURT

This photograph shows the United States Supreme Court as constituted March 15, 1929. The members are, seated left to right: James Clark McReynolds, Oliver Wendell Holmes, Chief Justice William Howard Taft, Willis Van DeVanter and Louis Dembitz Brandeis. Standing left to right: Edward Terry Sanford, George Sutherland, Pierce Butler and Harlan Fiske Stone.

THE SUPREME COURT

"That which by natural reason prevails among men is called the law of nations."

The Constitution of the United States provides that the "judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish." The Supreme Court is the highest court in the land, and the most powerful judicial body in the world. The decisions of this court are final in respect to the powers of the government and the rights of the people established by the Constitution. Thus their decisions determine the law—and must be obeyed.

The court consists of nine judges, called justices of the Supreme Court; the entire body is called the Supreme Bench. The presiding judge is known as the Chief Justice of the United States. These judges are appointed by the President of the United States with the approval of the Senate. Their term of office is during good behavior.

As the Constitution does not determine the number of the judges of the Supreme Court, the number may be changed at pleasure, except that it cannot be diminished so as to deprive a judge of his office.

[over]

Commercial Law

Chapter I

LAW IN GENERAL: ITS CLASSIFICATION AND SOURCES

"When Reason Fails, the Law Ceases"

Keep in mind these questions when studying this chapter:

1. **In its broadest sense, what is law? In a legal sense?**
2. **What are the chief sources of law?**
3. **How did common law originate?**
4. **What are precedents in law?**
5. **Why should we study commercial law?**

§ 1. **What is law?**—The principles upon which all laws are founded are those of common sense. It is in the power of every man to ascertain, if he does not already know, what are his rights, his duties, and his obligations to himself and to his fellowman.

In its widest sense, *law* is a rule of action fixed, prescribed, or laid down beforehand, and includes the laws of God, the moral law, the laws of nature, the laws of logic, and the like, as well as the laws of nations, states, and municipalities.

The term *law*, in a legal sense, includes the rules that have been formulated and established for regulating and governing human conduct and are recognized, applied, and enforced by courts in the administration of justice and in deciding controversies. This law may be in the form of legislative enactments known as "statutory law," or it may be what is known as the "common law," sometimes in a figurative sense called the "unwritten law."

§ 2. **Sources of law.**—In the United States laws are derived from three sources, as follows:

(1) Constitutions, federal and state.
(2) Statutes, federal and state.
(3) Common law.

(1) *Constitutions.*—The Constitution of the United States is a written instrument adopted by the people "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." It is the fundamental law of the nation and constitutes the framework of the federal government.

The powers of the federal government are those expressed in the Constitution, or implied therein, and the powers not so delegated, or prohibited, are reserved to the several states, or to the people. The Constitution, and the laws and treaties made thereunder, are declared to be "the supreme law of the land." (See Art. VI, second paragraph of the Constitution of the United States.)

The Constitution of a state is a written instrument, adopted by the people of a state, which they may change at pleasure, so long as it does not violate the provisions of the federal Constitution, statutes, or treaties. It is a limitation placed upon the reserved power of the state. It constitutes the framework of the state government and it is the supreme law within the state.

The United States Constitution is superior to a state Constitution, and any part of a state Constitution in conflict with the United States Constitution is void.

(2) *Statute law.*—The power to enact laws is governed by the Constitution. Those statutes which are adopted by congress and approved by the president are called "federal laws;" they must not violate the provisions of the federal Constitution. The laws adopted by the state legislature and approved by the governor are called "state statutes." The statutes of a state must not be contrary either to the federal or the state Constitution. A law contrary to either of these is said to be "unconstitutional," that is, of no effect whatever. It is one of the functions of a court to decide whether or not a statute is unconstitutional.

Statutes may change or modify the common law, as has been done by abolishing days of grace in negotiable instruments, or by permitting a married woman to hold property to the same extent as though unmarried. In other cases, the statutes may declare, in definite terms, parts of the common law in order to establish it more firmly. Legislative bodies have the power to pass statutes modifying or suspending the common law; but until they do so, the principles of the common law, as defined by the courts, are as binding upon the citizens of a state as though passed by a legislative body.

(3) *Common law.*—The common law is a system of legal principles which has prevailed in England and the United States in contrast with other great systems, such as the Roman or civil law. It is said to get its name from the customs which were common to all the people. It had its beginning in so remote an antiquity that its source cannot be traced. In England, whenever the written law failed to provide a rule to govern a particular case, the judges were expected to take the necessary rule from the customs of the community. Out of this practice developed the present system of common law.

The term "common law" in this country is understood to mean the unwritten law of England, so far as it is not inconsistent with our Constitution and statutes. It consists of broad and comprehensive principles, inspired by reason and a sense of justice, and receives its binding force from common consent and immemorial usage "whence the mind of man runneth not to the contrary."

§ 3. **Precedents.**—There existed, in medieval England, organized courts administering justice. The judicial decisions of these courts, in time, became what we now call precedents, which were followed by other courts in determining like matters. These decisions expressed the conception of the judges and their interpretation of what the law was. The judges were not, technically speaking, the source of the law, but were the means by which it was expressed; they declared its existence.

Modern courts follow the same practice as that of the courts of early times. Hence, it may be said, that the cardinal principle of our system of jurisprudence is that, when a point of law has once been officially decided, it forms the rule for

deciding all subsequent litigation to which it is applicable, that is, where the same questions are involved and the facts are substantially the same. The rule may be thus expressed: Like cases are to be treated by similar decisions.

§ 4. **Our heritage.**—The great body of our law—the common law of England—is a direct heritage, brought to us by the early colonists. It was that which formed the foundation of the system of laws in the thirteen colonies first adopting the Constitution of the United States. Other states, annexed to this original territory, came under the dominion of the same laws. It is a settled policy that, whenever a country is acquired by treaty or purchase, it retains the law in force at the time of the change until it is abrogated or altered by its new masters.

Many of the states adopted, by express legislative enactments, the common law in force in England in 1607, at the time of the settlement of the English at Jamestown, while other states fix a later date. Louisiana is the only state which has retained, as the basis of its jurisprudence, any other law, although Florida, California, and New Mexico show some traces of Spanish influence in their laws. Louisiana was a part of the territory ceded to this country by France, and it retained the Roman civil law in effect at the time the grant was made.

All law has the same ultimate object—the safeguarding of life, liberty, and property rights. The civil law that prevails in Louisiana is founded upon the Roman Law coming through the Code Napoleon compiled in 1810. Under these laws, the individual is as sufficiently protected as in any of the common law states. The chief difference between the foundation law of this particular state and of the other states of the Union is more in the matter of court procedure—methods by which suits are instituted and conducted, than otherwise.

§ 5. **Equity.**—Equity is a term synonymous with justice, and is a branch of our system of laws. It originated in the deficiencies of the ancient common law of England. In the early history of England, the King was held to be the fountain of justice. He was often petitioned to interpose between individuals, in legal matters, where the courts were unable to grant a remedy, or when an inadequate remedy was granted. These petitions the King referred to an officer, known as the

Chancellor, who would grant such relief as seemed equitable, hence called relief in equity. This relief did not replace the common law, but was supplementary to it. Equity proceedings, in time, became crystallized into definite rules or principles which have continued in force until the present time.

In the courts of practically all the states, there is what is termed a law side and an equity proceeding. The same court enforces both the rules of law and the rules of equity. The character the court assumes will be determined by the kind of case presented. These differences are too technical to be explained here, other than to say that equity attempts to protect the property where there is no adequate remedy at law.

The general object of an action at law is to recover damages. Damages may be in the form of compensation or indemnity for some loss or injury sustained by the complainant. A judgment at law is generally enforced by a seizure of the property of the party against whom the judgment has been rendered. In equity a judgment is referred to as a decree. A decree in equity requires the party against whom it is made to do or refrain from doing some act. Obedience to a decree is enforced by a court in punishing the individual for contempt. The aid of a court of equity is sought where compensation for damages would be inadequate for some injury to property or property rights. This is usually in the form of an injunction.

§ 6. **Roman law.**—What is known as the Civil Law of Rome grew out of the commentaries on the Twelve Tablets. The laws of these tablets were framed 451-449 B. C. by commissions consisting of magistrates, called the decemvirs. They formulated a code which was published on twelve bronze tablets, and these were posted in the city square or forum. One thousand years after these tablets had been given to the Romans, Justinian, a Roman ruler, with the assistance of an eminent lawyer, digested, simplified, and codified the great mass of laws, opinions and commentaries that had accumulated during that time. This work of Justinian, which was the greatest of the age and for which he has been called the "lawgiver of civilization," has formed the basis of the jurisprudence of continental Europe. It is usually referred to as the civil law.

The civil law pertaining to the family is considerably different from the common law. Under the Roman law, the father had no power to bequeath his estate to strangers, but if a minor married without the consent of his parents he might then be disinherited. The wife's value in taking care of the home is considered equal to that of the husband, and

she is therefore entitled to half of whatever he earns. The civil law relating to real property is much simpler than the law of the common law states.

The term civil law as commonly used does not always refer to the civil law of Rome nor to the system of laws that prevails in Europe. It more frequently means that branch of any legal system which is applied to the private rights of individuals in a community, and the legal proceedings in connection with them, in distinction from criminal law proceedings.

§ 7. **Law merchant.**—The term law merchant was originally applied to a system of special rules governing merchants and mercantile transactions. These rules were founded upon the usages and customs of merchants, especially foreign merchants, and were anciently administered in special courts which were, in the main, conducted by the merchants themselves, in the port towns and trade centers. In time, these courts disappeared, and the principles and rules applied to mercantile transactions became merged into the general good of the common law, and the law merchant, as a separate system, ceased to exist.

The principal subjects covered by the law merchant were insurance, bills and notes, partnership, bailments, and sales.

§ 8. **Commercial law.**—The term commercial law is applied to that portion of the general law which is particularly applicable to business transactions, the acquisition of property, and the relations of persons engaged in business.[1] It especially includes the laws relating to contracts in general, but it also deals with special contracts connected with commercial affairs, and is, therefore, more comprehensive than the early "law merchant," for that was confined mainly to a limited class of persons, and to but a few phases of law.

The chief aim of the study of commercial law is to acquaint the student with the essential elementary principles of law that he may enforce and enjoy his rights and thereby avoid making mistakes resulting from a lack of legal knowledge. The intricate and technical problems of law must, however, be left to the lawyer and practitioner. An amateur lawyer should be considered in the same class as an amateur surgeon.

---

[1] Business—That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, is business.—BLACK'S LAW DICTIONARY.

QUESTIONS FOR DISCUSSION
(Oral)

1. How did law originate? What is its chief purpose?

2. What is the supreme law of the land?

3. "A citizen in any given community in the United States is likely to find himself subject to three classes of statutory law." Explain just what this statement means.

4. Every trade and craft has certain customs and usages. Name several. If you were involved in a lawsuit in which there was a question relative to the usage of that particular calling, how would you attempt to prove it?

5. X, a grown man, saw a boy about to drown. The water was sufficiently shallow so that X could save the boy without danger to himself. If X should stand by and not attempt to save the boy, what law would he be guilty of violating?

6. In your state it is a question whether you may make a binding contract before you are twenty-one years old; and also whether you may vote at a public election before you are of "age." Suggest what law books you would read to find this information, if you desired to get the information yourself?

7. It is a well known principle that every man must pay his debts; perform his contracts, or pay damages; not defame his neighbor; etc. In your judgment, is such a requirement due to constitutional law? statutory law? or common law?

8. Peter Sterling has become involved in a legal controversy with a neighbor relative to the use of land on the highway. Sterling has employed a lawyer and given him a full statement of the facts as they pertain to the controversy, according to the former's conception. Where will the lawyer look for the law before he gives a definite answer as to the law applicable to the facts as stated?

9. The members of a law class insist that the Constitution is the most important source of law. They also insist that if all the divisions of law, except one, were to be abolished, the

law derived through the statutes and common law would be the easiest to get along without. What is your opinion?

10. How does our law expand and grow?

CASE PROBLEMS
(Written or Oral)

No. 1

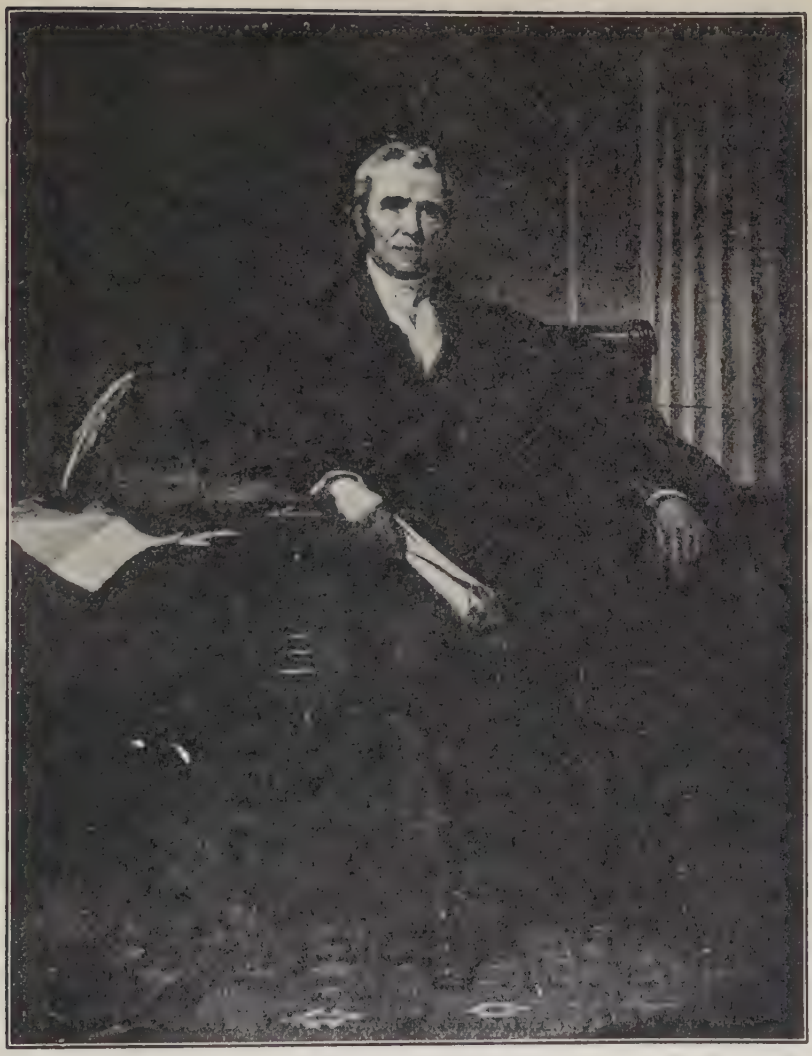
E. R. Smith, a tourist, driving through a neighboring state, violated a traffic ordinance, due to a lack of knowledge of the traffic laws of that particular state. Upon being arrested, he insisted that he was a stranger and should not be held accountable. Explain whether his plea was correct or not, and why? (34 Ala. 400.)

No. 2

In a certain state, the common law governing a particular legal principle had been clearly established for one hundred and fifty years by custom and usage. The legislature passed an act on the same subject, but in conflict with the common law rule that had been previously followed. If a lawsuit should occur in which this principle of law is involved which, in your judgment, will govern, the common law or the statute law, and why? (94 N. E. 199.)

No. 3

R. K. Smiley entered into a contract to deliver to C. R. Rankin "about" one hundred bales of cotton each month for one year, beginning on the first of January. During January, Smiley delivered ninety bales; in February, eighty bales; in March, eighty-five bales, and in April, ninety bales. Rankin then refused to accept any more cotton, claiming that Smiley had broken the contract since the amount delivered was not "about" one hundred bales as agreed. The decision of the court may depend upon the construction of the word "about." If there is no precedent covering a similar case, how would a rule applicable to this case be established? Explain how this rule would be applied in the future. (190 U. S. 157.)



JOHN MARSHALL

CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, AND EXPOUNDER OF THE CONSTITUTION

[OVER]

JOHN MARSHALL

SOLDIER, STATESMAN, LAWYER, PATRIOT, AND JURIST

> "He was one of those to whom centuries alone give birth; standing out like beacon lights on the loftiest eminence to guide, admonish and instruct future generations, as well as the present."
>
> *Justice Story*, 1835.

John Marshall was born in Germantown, Virginia, in 1755, and died in Philadelphia in 1835. He was an officer in the Colonial army from 1775 to 1779, where he won distinction as judge advocate in courts-martial. His chief distinction is as Chief Justice of the United States Supreme Court, which position he held for thirty-four years. His interpretations of the Constitution have long been recognized as "an important and permanent feature of American law." His decisions on constitutional questions established precedents that have been accepted ever since. He held that "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . A legislative act contrary to the Constitution is not law." (Marbury vs. Madison, 1 Cranch, 176.)

Chapter II

PROPERTY

Keep in mind these questions when studying this chapter:

1. **In a legal sense, what is property?**
2. **What are the rights in property, and limitation of ownership?**
3. **How is property classified?**
4. **In general, how may property be acquired?**

§ 9. **Property.**—The word "property" may be defined, briefly, as the exclusive right which one has to use, possess, enjoy, or dispose of anything that may be owned. The literal meaning of the word from which it is derived—*proprius*—is, "one's own." In a legal sense, it embraces every species of a valuable right and interest, capable of being available for payment of debts, or of passing to the representative of the owner upon the latter's death. In its ordinary use, the term property means anything which has an owner, and includes real and personal property—as lands, buildings, a mining claim, a franchise, or a debt; but not the sea, the air, and the like.

The sea and the air belong to mankind in common, and are, therefore, not capable of exclusive ownership by any particular person. But if an individual should inclose a certain portion of air or water in a receptacle, then so long as he thus retains it in that receptacle, it is his exclusive property.

It is one of the duties of the State to protect an owner in his property rights. To this end, the Constitution of the United States, as well as of the different states, provides that "no man shall be deprived of his life, liberty, or property without due process of law."

It must be understood that the term "exclusive right" does not confine the ownership of property to any one individual, for it may be legally owned by two or more persons at the same time, either jointly, or in common.

Limitations of Absolute Ownership.—There is, in a strict sense of the word, no such thing as the absolute ownership of property. There is

a limitation incident to the necessary requirements of organized society and civil government:

(a) A person is not at liberty to so use his own, as to injure the rights of another.

(b) The government has the right to take private property for public use upon making just compensation, as where a site is condemned for a post-office building.

(c) The right of the government upon so much property of a citizen as may be necessary for maintenance and administration of government.

(d) The State has the authority to control the use of property in the hands of its owners, within certain limits; and in some instances to take it away from them.

(e) The property of every person is liable for the payment of his just debts, unless otherwise exempt by statute. Nor can he legally dispose of it by gift or sale in fraud of his creditors.

(1) *Kinds of property.*—Property may be divided into two general classes: (a) real property; (b) personal property.

(a) *Real property* is the term applied to land or real estate. It is property which is immovable and permanent in its character and use, such as structures, the annexed fixtures, the trees, and vegetation above the soil as well as the mineral underneath its surface.

(b) *Personal property* is movable in its nature, and includes every particular sort of property not possessing the nature of real property, such as promissory notes, merchandise, crops, furniture, mortgages, books, stocks and bonds, animals, patents, manufactured goods, and the like. Personal property may be changed into real property, as where one takes brick and mortar—personal property—and constructs a house with them, which is then considered real property. If, in the lapse of time, that same house be razed to the ground, and the building material sold as such, it again acquires the characteristics of personal property.

(2) *Chattels.*—The name "chattel" is frequently applied to personal property and is the term usually employed at common law to denote personal property in general. It is a more extensive term than goods or effects, and includes every kind of property except property in land. Its meaning is commonly confined to things movable in their character, such as animals, machinery, grain, or any article that can be handled and transported.

The necessity for distinguishing between real and personal property arises from the fact that the laws applicable to the former are quite different from those applicable to the latter.

The laws relative to real property were largely developed out of the feudal system in the early history of England. The feudal system had but little influence upon the formation of laws relative to personal property. The latter grew up largely through the customs of merchants.

Real property can only be disposed of in accordance with the law where it is situated, while personal property is governed by the law where the transaction occurs. Real property is conveyed by a formal written instrument, while personal property may be transferred in an informal manner.

§ 10. **Ways of acquiring title to personal property.**—Personal property may be acquired in any one of a variety of ways, but the two most general are:

(1) By original acquisition.
(2) By transfer.

(1) *Acquisition.*—Under original acquisition there are several methods of acquiring title to personal property: (a) by occupancy; (b) by accession; (c) by intellectual labor; (d) by a copyright; (e) by a patent.

(a) *Occupancy.*—This is brought about by taking into one's possession what previously belonged to no other person, or what was abandoned by a prior owner.

Wild animals belong to no one in particular until they are captured. Whoever captures such an animal has the exclusive right to it while in his possession, or until it has become so far domesticated that it has the habit of returning after wandering at large. If, however, it escapes and regains its natural freedom, any other person may rightfully take it who captures or kills it. A mere temporary escape, as where a lion escapes from its cage, may not amount to regaining its natural liberty.

The finder acquires title to personal property abandoned by the owner, or to property that has been lost and never reclaimed. But the former owner must have completely relinquished his ownership, intending to give up all his rights in it before a perfect title will accrue to the finder. (See § 150.)

(b) *Accession.*—Title by accession is defined as the right to all which one's own property produces, either naturally or artificially. This includes the crops yielded by land; the in-

crease of animals; the uniting of the property of one with the property of another, as when an artist paints a picture on the canvas of another, the whole belongs to the artist, but the other has a claim for the value of the materials. Also by the mixing or confusion of goods, which occurs when one person wilfully mingles his own goods with those of another so that they cannot be distinguished from each other. If the mixing was by consent, each has a *pro rata* interest in the entire mass.

(c) *Intellectual labor.*—Authors, composers, and inventors have the exclusive use and control, for a limited time, in such personal property as owes its existence or value to their skill and labor. The general doctrine is, that one has a proprietary right in the product of his intellectual labor, and that this right should be protected by law for the purpose of promoting science, encouraging literature, and stimulating inventions.

(d) *A copyright* is a grant to authors for the exclusive right to possess, use, and dispose of their intellectual productions. This gives the owner the right to make, publish, and sell them, or to authorize others to do so, for a period of twenty-eight years, with the privilege of a renewal and extension for a further term of twenty-eight years.

A copyright may be secured for books, periodicals, lectures, sermons, addresses, dramatic and musical compositions, maps, works and reproductions of works of art, drawings, photographs, prints, pictorial illustrations, motion pictures, etc. It is essential that before a valid copyright can be secured, the work must possess originality and must not be (1) seditious, (2) libelous, (3) immoral, or (4) blasphemous.

(e) *A patent* is a grant for the exclusive privilege to make, use, and vend, and to authorize others to make, use, and vend, an invention for a period of seventeen years. The invention must be a new and useful art, machine, or composition of matter, not before known and used.

A patent, being property, the owner has the right to dispose of it, as have the owners of any other species of property. He may assign it in whole or in part, and for any given territory. He may give the assignee a right in the patent itself; or he may give a special license with the privilege of making, using, or selling on payment of a royalty. The courts afford protection for the infringement of a valid patent.

(2) *Transfer of personal property.*—Title to personal property may be acquired by transfer in two general ways: (a) by act of law; (b) by act of the parties.

(a) *By act of law.*—Transfer of title to personal property by act of law occurs: (*i*) by forfeiture; (*ii*) by judgment; (*iii*) by intestacy; (*iv*) by insolvency.

(*i*) *Forfeiture* is a loss of title by the owner as punishment for crime; a penalty for the violation of law; or a breach of contract. Title by forfeiture is practically obsolete, at the present time, as a punishment for crime. There may, however, be a forfeiture of goods for the evasion of revenue laws, or of shares in a corporation for a failure to pay assessments when due.

(*ii*) *A judgment* is a decision or sentence of law pronounced by a court, or other competent tribunal having authority, as the result of proceedings instituted for the redress of an injury or the settlement of a controversy. Title to personal property occurs as a result of a decision by a court whereby one person becomes entitled to take property belonging to another.

(*iii*) *Intestacy* is the state or condition of a person dying without having made a will, leaving personal property without disposal. The title is vested in an administrator as a trustee for the purpose of settling the estate, and the property is distributed in accordance with the statutes of the state where the deceased person resided. (See § 299.)

(*iv*) *A bankrupt's property* is transferred by operation of law to an assignee or trustee, who has authority to administer the same for the benefit of the creditors. (See § 48-4.)

(b) *By act of the parties.*—Transfer of title to personal property by act of the parties may be made: (*i*) by sale; (*ii*) by gift; (*iii*) by will.

(*i*) *Sale.*—Transfer of title to personal property, by act of the parties, occurs in a contract of sale, which is a transfer of the property in a thing for a money consideration, called a price. A transfer may be by an exchange of property,

whereby the title in property passes to another in consideration of the receipt by him of other property. This is called barter.

(*ii*) *Gift.*—A transfer of title may be in the form of a gift which is the actual, voluntary, and gratuitous transfer of property from one person to another. The gift must be accepted by the person to whom made, but the acceptance is presumed.

(*iii*) *Will.*—Again, the transfer may be in the form of a written instrument designated a *will,* which provides for the disposition of property to take effect after the death of the person who made the will.

Aliens may acquire, hold, and transfer personal property in the same manner as our own citizens; and they may bring suits for the recovery of their property when it is unlawfully detained.

§ 11. **Ownership.**—One who has all possible rights in connection with certain property is said to be the owner thereof. Ownership in the past, carried with it many less rights than are recognized today. In the course of time, the rights incidental to ownership have been extended until they include:

(1) The right to use;
  (a) So long as it does not interfere with the rights of others.

(2) The right to give away;
  (a) During life (as a gift).
  (b) After death (as by will).

(3) The right to dispose of by;
  (a) Sale.
  (b) Lease.
  (c) Contract.

(4) The right of inheritance.

(5) The right to accumulate without limit;
  (a) Subject to taxation;
    (*i*) General.
    (*ii*) Income.
    (*iii*) Inheritance.

QUESTIONS FOR DISCUSSION
(Oral)

1. Property is divided into two general classes, real and personal. Just why are these distinctions of any importance? If Jenkins sells his farm without making any special reservations, will the sale include the fences, out-buildings, farm machinery, growing crops, and live stock?

2. Rush owns a piano, victrola, and saxophone. He persists in making a noise on these different instruments at all hours of the night. His neighbors object, but Rush meets the objections with the statement that "private property means the right to do what you please with what you own." Are there any qualifications to that statement?

3. Bodkins found a bear trap set by Jefferson, on public land. Bodkins moved the trap to a new location, reset it, and caught a bear. Both parties claim the bear. To which one should it be awarded? (9 L. R. A. 174.)

4. Lynch wrote a valuable treatise on law. He is uncertain how he may protect his property rights. What would you advise him to do?

5. It has been repeatedly said that one may make a patented article for his own use, without the consent of the patentee, provided he does not make it for sale. Is that statement correct?

6. A thief steals your watch and pledges it to a pawnbroker. You discover where it is and demand its return. The pawnbroker insists he has a right to retain the watch until all charges are paid. May he do so?

7. Doe left an old lawn-mower on a public dump, where he discarded it. Roe took it home. Later Doe claimed it as his property. To whom does it belong, and why?

8. The law pertaining to personal property is much older than that relating to real property. Can you mention any special reason why this is so?

9. "At the present time a large share of the value of personal property is due to the labor done on its production." Explain what this statement means.

10. X was engaged to marry C. In anticipation of this marriage X received certain valuable presents from C, including money and a diamond engagement ring. X broke the engagement and married Y. C demands the return of his presents. Is he entitled to recover them?

11. What are the limitations on ownership of property? Are they socially justifiable?

12. Walker captures a fox which he places in a cage upon his premises. Harley removes the animal, claiming that it is a wild animal, therefore belonging to no one. Is his contention right?

13. If the fox (in question 12) had escaped and Harley had caught it in the woods, who would be entitled to it, Walker or Harley?

14. Karlin wilfully mixes his wheat of an inferior grade with wheat belonging to Perrine. What are the rights of the parties?

15. If the mixture in question 14 had been inadvertent, would your decision be the same?

16. Does the Constitution contain any provision in respect to property rights?

CASE PROBLEMS
(Written or Oral)

No. 4

A teamster borrowed a wagon from his neighbor and kept it several weeks. He then sold it to a farmer who was not aware that it was borrowed. To whom does the wagon belong? Is possession and ownership the same thing in law?

No. 5

If Lee purposely cuts down trees belonging to Betts and makes them into shingles, who owns the shingles? (5 Johnson [N. Y.] 349.)

No. 6

Certain fence rails had been piled up on a farm by the owner, preparatory to rebuilding the fence. These rails had been blown down by a windstorm. The farm is sold to Goodrich. Who owns these fence rails? (2 Hill [N. Y.] 142.)

No. 7

Brown, the owner of a house, engaged Cornell, a plumber, to install a bathtub. Before the tub was placed in the house, what sort of property was it? After being installed, it becomes what kind of property?

No. 8

Green innocently cut some timber from plaintiff's land. The timber was reasonably worth, when cut, $25. Green manufactured this timber into barrel hoops worth many times the value of the timber. To whom do the hoops belong? Why? What would be your answer if Green knowingly entered another's land and cut timber and converted it into articles of furniture? (22 Mich. 331.)

No. 9

Plaintiff took material to a tailor to have it made into a suit of clothes. Who owns the suit? If the tailor used some material of his own in making the suit, would that change the situation any? In what respect does this problem differ from the one above?

Chapter III

CONTRACTS: THEIR FORMATION, OPERATION AND TERMINATION

Keep in mind these questions when studying this chapter:

1. **What are the general principles pertaining to contracts?**
2. **Are there distinctions between contracts and agreements?**
3. **How are contracts classified?**
4. **Why are some agreements enforceable while others are not?**
5. **What are the essentials of a valid contract?**

§ 12. **Introduction.**—Contracts are the basis of all lawful business transactions. The term "contract" is a very common expression in daily usage, so much so that we are likely to overlook its legal significance. Business is but another name for the making and executing of contracts. It may be said that there is no act common to business either so small or so complex that the principles of law relating to contracts, in some form or other, are not applicable.

Making a contract may be a very informal affair—and most of them are—or it may be the signing of a formal and formidable legal document. The purchase of a lead pencil involves the same legal principles of contract as in the purchase of a battleship; likewise, the employment of a bank cashier, or the hiring of a laundress; the borrowing of a dollar, or leasing a farm; each requires in theory all the elements of an enforceable contract, and so on through every phase of commercial activity. However, due to their insignificance, small purchases and minor business transactions rarely result in a resort to the courts for the enforcement of their terms.

The word *contract*, derived from the Latin (*contractus*, from *con* and *traho*, meaning to draw together, to bind), is the legal term for a bargain or agreement. It will be noted that a contract ties the parties together by its terms and requirements.

§ 13. **Definition.**—A contract may be defined as *a mutual agreement resulting in an obligation, enforceable at law.*

Chief Justice Marshall's definition has often been quoted: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." (4 Wheat. 122 [1819].)

It has also been defined as "An agreement voluntarily made, upon a good consideration, between two or more persons capable of contracting, to do, or forebear to do, some lawful act."

While all contracts are agreements, not all agreements are contracts. To be enforceable, the agreement must contemplate a legal—not social, friendly, or frivolous—obligation, for a breach of which a court will award damages or compel performance; provided always such formalities and essentials as the law may prescribe have been complied with.

The words *enforceable at law* mean that the contract is legally binding and the law may be invoked to enforce it. If this were not so, every man would be at the mercy of his stronger antagonist. Courts will not take notice of the violation of social courtesies, since no useful purpose would be served by enforcing such engagements.

Brown invited Black to be his guest at a theatrical performance, and Black accepted the invitation. Brown purchased the tickets, but Black failed to keep his appointment. This was an agreement, but not a contract. It contemplated a social engagement, not a legal obligation.

If one should lend another money for the purpose of engaging in an unlawful transaction (for instance, to bet on an election), the money could not be recovered. The law cannot be used for enforcing illegal contracts.

Defendant White gave his check for $300 to the plaintiff for an old watch worth $15. The plaintiff presented the check to the bank for payment and it was not paid; he then brought suit against White. It appeared the whole transaction was a frolic and banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch. Accordingly, the court dismissed the suit since neither party intended a legal obligation. (11 Mich. 248.)

If, however, one making a jest, does not deprive the words of their ordinary meaning, and leads another reasonably to understand that the words are seriously intended, the jest may result in an enforceable agreement.

§ 14. **Kinds of contracts.**—For convenience, contracts may be divided into two general classes, namely:

(1) Simple or parol contract.
(2) Specialty contract.

(1) *A simple or parol contract* is one not under seal. This is the most common form, and the great majority of contracts are of this character. Parol contracts are: (a) express or implied, (b) written or oral, (c) executed or executory.

(a) *An express contract* is a contract definite in all of its terms and conditions, whether by writing, by word of mouth (oral), or by signs; as, the nodding of the head in an auction, the purchase of a book, or the hiring of a clerk at an agreed price.

An implied contract is one the law will infer from the acts of the parties indicating a mutual intention to contract. If one enters a restaurant and eats a meal, it is implied that he will pay the ordinary price for it.

(b) *Written* contracts are those in which the conditions, terms, and other essentials are in writing. The writing need not be a formal instrument, but may consist of letters, telegrams, or other related memoranda. There are certain contracts (to be considered later)[1] which, to be enforceable, must be in writing. Written contracts prevent misunderstanding. They are a safeguard against inaccuracies, misrepresentations, and false evidence; but care must be exercised in their execution, for when a contract is reduced to writing it is presumed to cover everything pertaining to the agreement.

An oral contract is one expressed in spoken words. In the absence of a statute requiring it to be in writing, it is as enforceable as a written agreement, but may be more difficult to prove.

(c) *An executed contract* is one which has been fully performed or completed so that nothing remains to be done, as a paid note.

An executory contract is one in which the conditions are not yet performed, as an unpaid note. It is an agreement to do or not to do a particular thing.

If the conditions of the agreement have been performed by only one of the parties, it is executed as to him, but is executory as to the other party. Smith sold and delivered to Jones a wagon, but Jones has not paid for it. The contract is executed as to Smith, but executory as to Jones.

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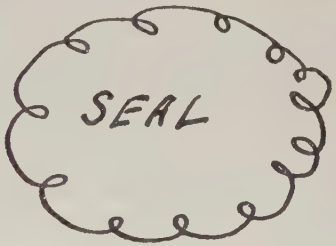
[1] See § 84.

(2) *A specialty* is a contract under seal, as a deed, mortgage, bond, and the like. To be effective, it must be in writing, signed, sealed, and delivered.

A contract under seal is one that has a seal in connection with the signature, and under the common law no other consideration was necessary. Originally a seal was an impression on wax, but now when required it may consist of a small wafer or scroll, or an imitation thereof made with a pen, as:



Private seals have been abolished or their value greatly modified in most of the states, so that a contract under seal is of no more legal importance than one not under seal. In those states where seals are still in use, the distinction between contracts under seal and those not is more theoretical than real.

A seal belonging to a corporation, or a company, is still used to authenticate important documents. In this respect the seal is presumed to act as a safeguard against forgery.

The use of the seal is of remote antiquity, but little significance is attached to their modern use. Seals are mentioned several times in the Bible.[1] During the middle ages there was a revival in their use as a substitute for signatures, and they were considered the main proof of the authenticity of all sorts of documents, both public and private. It was a stamp of authority and was necessary if the instrument was to be enforced legally.

The documents were sealed by dropping molten wax on the parchment and making an imprint of the seal thereon. The die consisted of whatever device suited the fancy of the person adopting it. It was usually engraved on a ring, that it

[1] I. Kings xxi, 8; Daniel vi, 17; Jeremiah xxxii, 10, 11, 14, 44.

might accompany the owner and be ready for instant use, and also for greater security in preventing its illicit use by unscrupulous persons.

§ 15. **Validity.**—Contracts, as to their validity, may be classified as;

(1) Void.
(2) Voidable.
(3) Valid.

(1) *A void contract* is one that has no force or effect whatever, being wholly unenforceable and destitute of legal effect. An agreement to do an unlawful act would be void.

(2) *A voidable contract* is one that may be affirmed or rejected at the option of one of the parties, but which is enforceable unless he elects to avoid it. Hence, a voidable contract is not necessarily void. If the contract is not rescinded, it imposes on both parties the same obligations as if it were not voidable.

Contracts made with persons not of lawful age are voidable. A minor may affirm or reject the agreement so far as he is concerned, but the person competent to contract will be bound.

(3) *A valid contract* is one that contains all the essential elements required by law and is unqualifiedly enforceable.

§ 16. **Essential elements.**—The following elements are indispensable and must be present in every contract to make it valid (binding) :

(1) Parties legally capable of contracting.
(2) Mutual agreement.
(3) Legal object.
(4) Valuable consideration.
(5) Required form.

QUESTIONS FOR DISCUSSION
(Oral)

1. Rush promised to deliver two hundred copies of the Daily Press to the owner of the news stand at the Brown Palace Hotel. The dealer agreed to pay $2 for the consign-

ment. Rush failed to deliver the papers. Has the dealer an action at law?

2. Rush, and the newsdealer, agreed to take lunch at the "Cozy Corner" where they were to meet at twelve o'clock. Rush failed to appear. Has the dealer an action at law against Rush for damages?

3. "While all contracts are agreements, not all agreements are contracts."

(a) Lykens invites Collins to attend a theater party which the former is giving. Collins accepts the invitation but fails to keep his promise.

(b) Lykens offers Collins $10 if the latter will walk across a bridge. Collins does so.

(c) Lykens telephones his grocer to "send me a barrel of flour." The grocer fills the order.

Classify these statements as to which are contracts.

4. Upon entering a barber shop, Amos Wright removed his hat, coat, and collar, and then proceeded to occupy the chair assigned to a deaf and dumb barber. Wright was given a shave. Does this constitute a contract? If so, what kind of a contract is it?

5. Have you heard it said that "all contracts must be in writing in order to be enforceable"? Do you agree with this statement? If not, modify it?

6. Richmond wrote to Sumner, "I am very anxious to sell my automobile. I want $300 for it." Sumner answered immediately saying, "I will give you $300 for your automobile." Is this an agreement enforceable at law?

7. Henderson sold his crop of hay to the Gray Trucking Company for $600. It was agreed that the hay should be delivered in installments and paid for as delivered. Classify this contract as to the time of performance.

8. Classify the following contracts as to their validity:

(a) Madison offered Hall $400 for the latter's automobile. Hall accepted the offer and received a down payment of $100 from Madison.

(b) Defendant agreed to pay plaintiff $100 if he would set fire to his neighbor's garage.

(c) A freshman in high school signed a contract in which he agreed to buy a radio from the Electric Supply Company for $50.

CASE PROBLEMS
(Written or Oral)

No. 10

An agricultural magazine was sent to a farmer's address for one year. The farmer neither rejected nor returned the paper. The publisher seeks to collect from the farmer. Result? (78 Wis. 146.)

No. 11

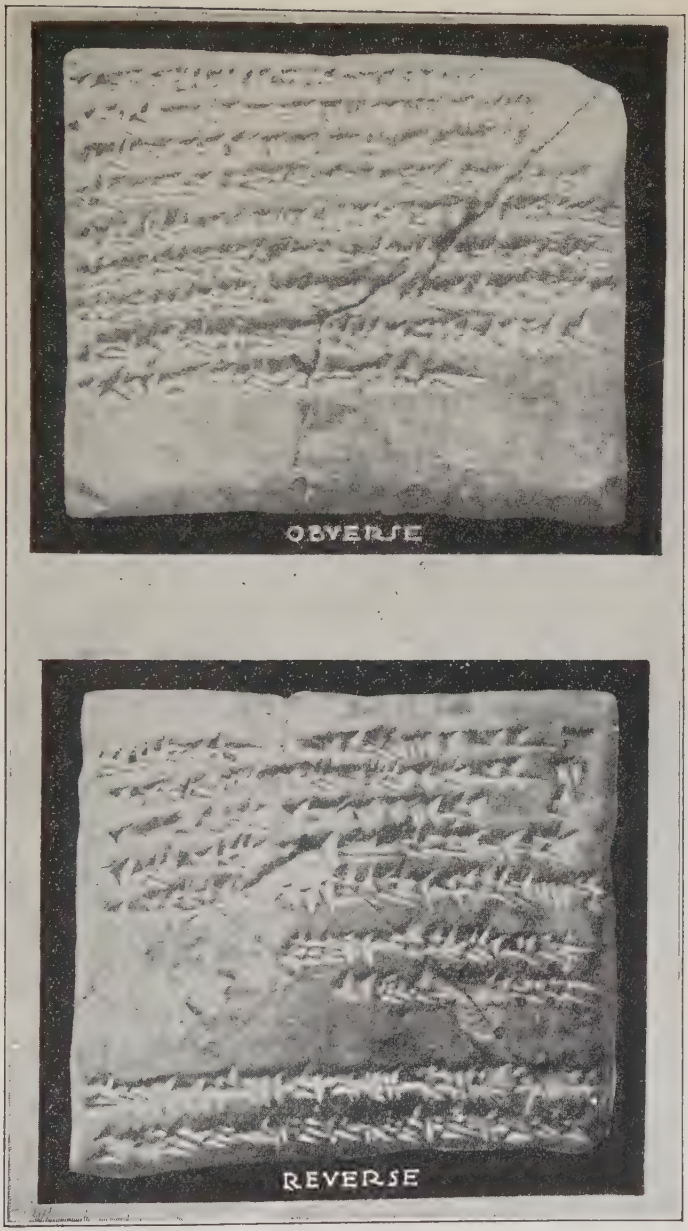
Richard Roe, a retail coal dealer, in a bantering and bluffing spirit, proposed to sell to John Wright ten thousand tons of coal at $3 per ton, which was $1 under the market price. This agreement was put in writing and Roe signed it. He afterward sought to avoid liability on the ground that it was not intended by either party to be a sale, but was purely a bluff or banter and without serious intent. Wright brought suit to recover damages, contending that it was a bargain seriously made. What, in your opinion, ought the decision in the case to be? (11 Mich. 248.)

No. 12

A agrees to sell, and B agrees to buy fifty barrels of flour at a fixed price and at a particular time. Is this an express or implied contract?

No. 13

If A failed to perform fully his part of the agreement in the foregoing problem by delivering only forty-nine of the fifty barrels, can A, in a suit, recover payment for what he had delivered, and how much would he be entitled to collect? Would such a suit be based upon an express or an implied contract?



AN ANCIENT BABYLONIAN CONTRACT

[over]

AN ANCIENT BABYLONIAN CONTRACT

The illustration on the preceding page depicts a contract made in the reign of King Artaxerxes (464-424 B. C.), more than 2,300 years ago. It was inscribed on a baked brick dug up in the ruins of the ancient City of Nippur, Babylon.

The following is an accurate translation of the contract:

"Bel-ah-iddina and Belshunu, sons of Bel– — and Hatin, son of Bazuzu, spoke unto Bel-nadin-shumu, son of Murashu, thus: As concerns the gold ring set with an emerald, we guarantee that for twenty years the emerald will not fall out of the gold ring. If the emerald should fall out of the gold ring before the end of twenty years, Bel-ah-iddina, Belshunu, and Hatin shall pay unto Bel-nadin-shumu an indemnity of ten mana of silver. Thumb-nail mark[1] of Bel-ah-iddina, Belshunu and Hatin instead of their seal."

[1] Line 15.

Chapter IV

PARTIES COMPETENT TO CONTRACT

Keep in mind these questions when studying this chapter:

1. **What is meant by competency in connection with contracts?**
2. **In general, who are incompetent to contract?**
3. **An incompetent person is liable on what contracts?**
4. **How are necessaries determined?**
5. **What are the rights of married women to contract?**

§ 17. **Required numbers.**—To every agreement there must be at least two parties, the one who is bound to perform the contract, and the other who is entitled to have it performed. The familiar saying, "It takes two to make a bargain," is good law. Each of the parties may consist of one or a number of persons, as an individual, a partnership, or a corporation.

§ 18. **Competency.**—By competency is meant the legal and mental capacity to make an enforceable contract. There are a few persons whom the common law, for their protection or on the ground of public policy, regards as incapable—to a greater or less degree—of binding themselves by an enforceable obligation; all others are competent. Among the former may be classified:

(1) Infants.
(2) Insane persons.
(3) Drunkards.
(4) Married women.

(1) *Infants.*—All persons under the age of twenty-one years are minors. In legal language, they are known as infants. In some states, women become of age upon completing their eighteenth year, and in other states, one or both sex upon marriage.

It is interesting to note that under the common law a person is of full legal age at the beginning of the day preceding the twenty-first anniversary of his birth, that is, the last day

of his twenty-first year.[1] And until the moment infancy ends, the infant is entitled to the full protection of the law in regard to his contract obligations.

The fraction of a day is not regarded in law, except in those cases imperatively required by justice. Applying this rule, it is possible for a person to attain his majority almost two days before he is actually twenty-one years old. Thus, a child born the first day of February, in the year 1910, on the last second before midnight will be of full legal age on the first second after midnight on the last day of January 1931, with full power to do anything thereafter that any one of legal age may do.

In law it is the same whether a thing is done at one moment of the day or at another. (Sharswood's Bla. Book 1, p. 463.)

The age of twenty-one has been arbitrarily fixed upon as the time when the average person is competent to contract intelligently. Hence, it is the duty of every person to inform himself concerning the age of the one with whom he is dealing and guide himself accordingly.

The selection of this age is supposed to have originated in the feudal system which regarded the subject as physically fit at that age, if a male, of doing Knight service, and following his Lord to the wars.

(a) *Emancipation.*—Under the statutes of some jurisdictions, an infant or minor may be granted the rights of a person of legal age, although he has not reached the age fixed by law for his majority. The conferring of such a right is called *emancipation*, and this emancipation partially removes the disability of infancy.

When an infant has been emancipated by the father relinquishing his custody and refusing to support and maintain him, the infant may receive his own earnings, but this does not enlarge or increase his capacity to make contracts. A daughter is emancipated by marriage.

(b) *Personal privilege.*—The privilege of infancy is a personal privilege, of which no one can take advantage but the minor himself. It is a legal shield thrown around him for protection against the wrongful designs of persons of mature years and larger experience. Hence, contracts that are beneficial to the infant are voidable at his option, but are binding on a person of full age. Nor will one be protected who, ignorant of that fact, makes a contract with a minor.

[1] In California and South Dakota not of age until the anniversary day.

(c) *Exceptions.*—There are some exceptions to the rule that the contracts of minors are voidable. Some are void, as for instance, the appointment of an agent. Some are binding, as for instance, for necessaries, "since an infant must live, as well as a man."

(d) *Necessaries.*—A minor is legally liable for the actual value of necessaries furnished him. Necessaries include those things reasonably required for maintaining one properly, according to his age, rank and fortune. They must be necessaries and not luxuries or mere ornaments. These requirements include not only food, clothing and lodging, but also medical and educational needs. It has been held that instruction in singing and dancing are not included in the list of necessaries.

If the minor has a family, his liability for necessaries will extend to them. If he is supplied with the necessaries his own contracts do not bind him. Under the common law, the father has absolute control over the person and property of his minor children until they attain their majority.

An infant's agreement to marry is voidable like all other executory contracts, but if the agreement is executed then he will be bound by it. After marriage, the contracts of an infant for the support of his wife will be as binding as for his own necessities.

It has been held that where an infant made a contract and paid four months' tuition for instruction in telegraphy, but changed his mind and took no instruction, he was entitled to recover the advance payment.

An infant rented a room for a specified period for the purpose of attending college, but quit before the end of the agreed time. He was held liable for the reasonable rent for the time he actually occupied the room, but no longer.

The courts have excluded from the list of necessaries under most circumstances, kid gloves, walking canes, cigars and tobacco, pleasure trips, automobiles, and motor-cycles.

(e) *Ratification.*—The voidable executory contracts of a minor may be affirmed by him upon reaching majority, in which case both parties will be bound. Affirmance must be shown by an express promise or an act from which such can be clearly implied. If the contract is once ratified by a former infant after he has attained his majority, he cannot later disaffirm it; nor can he ratify a contract which he had previously disaffirmed. Of course, there is nothing to prevent the

parties from entering into a new contract covering the same subject matter, if they so desire.

The voidable executed contracts of a minor must be disaffirmed within a reasonable period after majority. Failure to disaffirm will make the contract binding on the infant. Executed contracts for personal property can be repudiated at any time by the minor, but in case of real property, the privilege of disaffirmance can be exercised only after becoming of age.

The minor cannot ratify a part and reject a part of the contract, but must affirm or repudiate the whole agreement. When the infant repudiates his contract, he must return any money or property still in his possession, which he may have received under the contract. If he has spent the money, or lost the property, he cannot be held accountable for it, and is not deprived of his privilege to avoid the contract on that ground.

William Speers, an infant, bought a motor-cycle from Wilson. He did not pay the full amount at the time of the purchase. After Speers became of age he acknowledged the debt and promised to pay it. This promise constituted ratification.

A minor is liable for injuries to property or to persons wrongfully committed by him. If he obtains possession of property fraudulently, he will be held liable for his wrongful act. If he pretends to buy something, but does not intend at the time to pay for it, there is no contract between the minor and the seller. If a minor rents a car and deliberately injures it, or uses it for another purpose than that for which he hires it, he will be held liable for damages.

(2) *Insane persons, idiots, and inebriates.*—Insanity is a term used to describe the condition of a person whose mind is unsound or deranged, and includes lunacy, idiocy, senile dementia, kleptomania, monomania, and other mental derangements of like character. An idiot is one who has had no mind from his birth.

There is a conflict among authorities as to the liability of insane persons for their contracts. It is generally held that a contract made with a person mentally incompetent to contract is not binding upon him. A lunatic or an idiot, therefore, is incompetent to make an enforceable contract, except for necessaries. In this respect, his liability is the same as that of a minor; that is, his contracts are voidable. But a mere weakness of mind does not incapacitate a person from contracting.

or excuse him from performing, particularly when the agreement is not tainted with fraud.

There is a tendency to hold persons of unsound mind liable if the transaction is fair and reasonable, and was made without the other party's having a knowledge of the lack of mental capacity. It is well known that a person may be insane upon some one subject and quite sane upon all others. Such persons may make thrifty bargains without betraying their mental infirmity. It is not reasonable that they should be permitted to obtain and retain property without paying for it. The insane person has incurred no loss, and why should the other party suffer, having done no wrong?

If an insane person recovers his reason, he may ratify or disaffirm any contract made by him while insane. If he elects to disaffirm, he must return whatever property he received that is still in his possession. Acts done during lucid intervals are perfectly valid at all times.

All persons are presumed to be sane until proved otherwise. One suspected of insanity may be brought before a judicial tribunal where the mental capacity will be legally determined.

Such a proceeding is constructive notice to all concerned if the one tried should be adjudged insane. In many of the states the contracts of those who have been judicially declared insane are absolutely void.

(3) *Drunkards.*—"Insanity is a misfortune; drunkenness is a vice." Persons who are in such a state of intoxication as to be unable to realize their acts may avoid their contracts made while in such condition.

If an intoxicated person signs a contract he has agreed to make when sober, his intoxication will not excuse him from his performance. Likewise, the contract of an habitual drunkard will be binding, if made during a sober interval. To be relieved from liability on the ground of intoxication, the person must have been so drunk that he could not exercise his judgment; his reason must have been suspended.

Intoxication is a legal excuse for avoiding a contract, but is not ordinarily a legal excuse for the commission of a crime.

(4) *Married women.*—Under the common law, a married woman had fewer rights in matters of a contract than a minor, for as has been shown, the agreements of a minor are,

for the most part, only voidable, while those of a married woman were, as a general rule, absolutely void. This disability, however, has been largely, if not entirely, removed by statutes in nearly all of the states, and married women may now contract and be contracted with as fully and freely as any other person.

Historically, the common law rights of married women are of much interest. In early times, and among primitive people of the present time, the wife was and is the property of the husband, to do with as he may desire, as she was acquired by gift, purchase, capture, or barter.

Under the common law of England, the husband and wife are considered one person—and that person is the husband. The legal existence of the wife was suspended, or at least incorporated and consolidated during marriage into that of her husband, under whose wing and protection only was she permitted to do any legal act.

QUESTIONS FOR DISCUSSION
(Oral)

1. William, who was eighteen years old, fell heir to a diamond stick pin worth $2,000. X, selling worthless oil stock, persuaded the young man to purchase two hundred shares of stock in exchange for the diamond. After the contract was duly signed by both parties, William became tired of his bargain. State the rule of law which applies. What would be the result if the rule were otherwise?

2. A minor purchased the following items in a department store: gloves, overshoes, dress suit, and dancing slippers. Is he bound to pay for these articles?

3. A high school junior bought an English text book used in his classes at school. The boy agreed to pay the price ($5) asked by the book dealer. The book could have been purchased for $3.50 at other stores. Is the minor liable? If so, for how much?

4. John, nineteen, and Mary, eighteen, mutually agreed to marry. This is a contract. Is it enforceable? What is the legal effect of a contract made by one minor with another minor?

5. What is the meaning of the statement that "Infants are favorites of the law"?

6. Spring, who was born February 1, 1907, entered into a contract with Lacy during the former's minority. On January 31, 1928, Spring ratified the contract but disaffirmed it on February 1. Is Spring liable? When is he of legal age?

7. Doe, a minor, induced the Broadway Radio Company to sell him a battery by representing himself to be twenty-two years of age. May the Radio Company recover damages from Doe for deceit?

8. X, an insane person, during a rational period, signed a contract in which he agreed to sell his automobile for $300. Later his representative sought to avoid the contract pleading X's insanity. Result?

9. After imbibing two or three glasses of hard cider, Doe signed an application for life insurance. He refused the policy when delivery was tendered. Result?

10. If one in a complete state of intoxication, purchases a number of articles, and after his reason returns, uses them, can he be compelled to pay for them?

CASE PROBLEMS
(Written or Oral)

No. 14

An insane person, living the life of a hermit, came to a country grocery store regularly once a month and bought bread, sugar, meat and other supplies. The grocer never took advantage of the hermit's unfortunate condition, selling him only such foods as he needed and such as would keep. Can the grocer collect? (53 N. H. 627.)

No. 15

The defendant, a minor, bought groceries from the Lee Mercantile Company for himself and his wife. He later sought to avoid paying for the goods on the ground that he

was a minor. The court held that he was liable. On what principle? (52 Wash. 41.)

No. 16

A young man twenty years of age entered into an agreement with the Sunshine Supply Co. to act as bookkeeper for three years. At the end of six months he resigned without the consent of his employer. The company refused to pay the salary in arrears, claiming it suffered damages from a breach of contract, exceeding the amount due. Can the young man collect the salary due for the services he has rendered? (58 Mass. 217.)

No. 17

Pat Rooney traded horses with a minor. The minor used the horse he received in the trade until it became "poor," while the horse he disposed of was placed in a pasture until it became fat. Can the minor compel Rooney to trade back? If the minor received "boot" money must he return this money in case they trade back?

No. 18

A merchant extended credit to John Henderson Brown, who, in all appearances was perfectly sane. It afterward developed that Brown had been adjudged insane. Can the merchant collect the amount of the credit extended?

No. 19

The defendant, a minor, bought a horse and plow. He gave a note in payment. After he became of age he sold the horse but kept the plow. He resists paying the note for the reason that when he gave it he was a minor. In this case is that a good defense? Why? (9 Mass. 519.)

No. 20

T. B. McCarthy bought goods at an auction conducted by the Bowling Green Storage Co. At the time McCarthy was insane, but had not been judicially declared so. He was afterwards declared insane and his guardian desires to have the sale declared void. Result? (182 App. Div. [N. Y.] 18.)

Chapter V

MUTUAL ASSENT

Keep in mind these questions when studying this chapter:

1. **What is the basis of all legal contracts?**
2. **What is an offer, and how made?**
3. **What is an acceptance, and how made?**
4. **When and how may an offer be recalled?**
5. **When is the offer, and acceptance, made through correspondence complete?**

§ 19. **Agreement.**—The basis of legal contracts is agreement, without which there can be no contract. In law, agreement means the apparent meeting of the minds of both parties in agreeing to exactly the same thing in the same sense; in having in mind the same terms, conditions, and subject-matter in making a contract with the serious intention to be bound thereby.

Plaintiff offers to sell defendant a house and lot on Main Street. Plaintiff means Main Street in one city while defendant has in mind Main Street in another place. There is no agreement, their minds did not meet.

L. J. Long offers to sell M. N. Moore one hundred bushels of wheat. Moore accepts. This is sufficient. Their minds met. No particular one hundred bushels of wheat need be specified.

Miss Anna Rooney signed a contract as a joke; the other party knew it was a joke. There was no contract. There must be a serious intention to be bound by the agreement.

§ 20. **Offer and acceptance.**—An agreement is composed of two elements:

(1) An offer.
(2) An acceptance.

(1) *An offer* is a proposal by one party, called the offeror, to enter into a legal relationship with another.

(a) *Offer; how made.*—The offer must be communicated. This may be by words or acts. If by words, they may be written or oral; no particular form is necessary. The offer need

not be made to any particular or definite person; it may be made to all the world, any one of whom may accept it.

An automatic vending machine is an offer on the part of the owner of the machine to supply articles in return for the act of placing a coin in the machine. An advertisement in a newspaper or circular letter is not regarded as an offer, but merely as an invitation to trade.

When an offer is made by mail or telegraph, the means used for communicating the proposition is the agent of the one making the offer. If an error occurs in the transmission, the offeror will be bound, providing the offeree complied with its terms in accepting it. The one making the offer must sue the telegraph company for the damages, since he must be the party responsible for the agency selected by him.

(b) *Offer; how recalled.*—An offer may be recalled any time before it is accepted. If the offer is recalled, it must be before there is an acceptance, and notice of the withdrawal must be communicated to the one to whom the offer is made. If there is no fixed time for acceptance, the offer is presumed to remain open for a reasonable time.

After an offer has been withdrawn, if the offeror is still willing to reopen it he is, of course, at liberty to do so, and he may be glad, indeed, to receive a tardy acceptance. But an offeree who tries to accept after the offer has lapsed, has no lawful claim against the maker of that bygone offer for damages. If the offeror receives something as a consideration for holding the offer open for a fixed time, it cannot be withdrawn without liability, before the expiration of that time. The death or insanity of the one making the offer will usually act as a revocation.

L. K. Brown in Chicago sent a letter on Tuesday to R. J. Smith in Chattanooga, offering to sell a carload of produce at a certain price. This letter was delivered to Smith at noon on Wednesday. Wednesday morning Brown mailed Smith a letter withdrawing his offer made the day previous. This last letter was delivered to Smith at noon Thursday while he was in the act of writing a letter of acceptance. This was a legal recall of the offer, and Smith could not accept.

(c) *Reward.*—An offer to pay a reward for the performance of any service is an offer, and anyone who complies with the terms of the offer may receive the reward. The service

must be rendered with the full knowledge of the offer and with reliance upon it, otherwise no claim can be made for the reward. The offer of a reward is not of itself a contract, and may be revoked at any time before it has been acted upon. The same publicity should be given to the revocation that was given to the offer. After the offer has been complied with, it becomes a contract obligation.

A sheriff published a notice offering a reward of $700 to any person or persons giving information leading to the arrest and conviction of a murderer. The plaintiff gave information leading to the arrest before he knew a reward had been offered. The court held that the plaintiff could not recover the reward since it appeared he had not acted in any sense in reliance thereon. (38 N. Y. 248.)

(2) *An acceptance* is the assent by the other party, called the offeree, of his willingness to do, or not to do, that which was proposed.

The acceptance must be unconditional and identical with the offer. The agreement is not completed until there is an acceptance by some specific individual, which must be made known to the offeror by some word or act. In law, silence does not give consent; there must be speech or action; a mental determination to accept is not sufficient. The nodding of the head or shaking hands in response to an offer will constitute an acceptance.

A man standing in front of a burning building shouted, "I will give $5,000 to any person who will bring the body of my wife out of that building dead or alive." This was an offer, and its acceptance was completed when one of the crowd entered the building and brought out the woman. (42 Am. Rep. 731.)

If the offeror requires that the acceptance be made in a particular manner, it must be so made in order to constitute a contract. The person making the offer may require that the acceptance be actually received by him and within some definite time. In such a case, if the offeree sends an acceptance which fails to reach the one making the offer, there will be no contract. One cannot make an offer and stipulate that if he does not receive an answer, he will consider it an acceptance. No person can be compelled to speak or write.

§ 21. **Counteroffer.**—The offer must be accepted in accordance with its terms. If the offeree varies, or qualifies the proposition in any manner, his acceptance becomes a counter-

offer subject to approval or rejection by the original offeror. A counteroffer acts as a revocation of the preceding offer, and is equivalent to its rejection.

B. L. Jones wrote a letter to K. J. Brown in which he offered to sell apples in certain quantities at a specified price. Brown accepted the offer, but added in his letter that the apples "must be prime quality and run two hundred net to the barrel." Brown's acceptance was in reality a new or counteroffer.

Brown might have agreed to accept the apples in accordance with the offer and requested a change in size of apples, or a different date of delivery. If Jones accepted the proposed changes the result would have been a modified contract.

§ 22. **Contracts by correspondence.**—An offer to contract may be made in person, by an agent, by letter, or by telegraph; the acceptance of it may be given in the same manner. If a person, by correspondence, proposes to bind himself by contract and states the terms and conditions, the party to whom the proposition is made must, within a reasonable time after the receipt of the proposal, accept it as made, if he wishes to become a party to the agreement.

If the offer is made by letter or telegram, the offeror may recall it by a subsequent communication, provided it reaches the offeree before an acceptance has been written and posted.

As soon as an acceptance is properly placed in the mail it is a contract, the acceptor having done what was required of him to close the transaction. The acceptance takes effect from the time of mailing the letter and not from the time of its receipt. On the other hand, a withdrawal of an offer by mail takes effect when the letter of revocation is received by the offeree and not at the time it is placed in the mails by the offeror. The posting of the letter, or the sending of the telegram must be such as to place it beyond the control of the sender.

The rule that an acceptance is effective when mailed, applies even when the letter is lost. This appears to work a hardship on the offeror. One of the parties, however, must always be in the dark as to whether the acceptance was received. It seems just to place the burden on the offeror, because (1) he started the negotiation, and (2) he can protect himself in the terms of his offer by making actual receipt of the acceptance necessary.

QUESTIONS FOR DISCUSSION
(Oral)

1. "We have prepared, and are sending under this cover by registered post, a printed document setting forth the terms and conditions under which the Iver Johnson revolvers will be supplied to the jobbing trade."

Upon receipt of a circular letter containing the above information, the Vulcan Hardware Company sent an order for revolvers on the terms stated. The seller refused to fill it. What are the rights, if any, of the Hardware Company? (209 Mass. 89.)

2. A number of accountants, in competitive examination, applied for an important position with a large corporation. The committee in charge chose the highest ranking competitor, but did not communicate this information to the successful applicant, who in the meantime learned of the committee's action. A week later the committee reversed itself and appointed an "outsider." The ranking applicant sued the corporation for breach of contract. Was he entitled to damages?

3. Less than a week after he had received an offer from Green, by letter, White mailed his acceptance. On the same day Green revoked his offer by letter. Can White hold Green to the contract?

4. A wholesale house offered a retailer a large shipment of coffee. The retailer accepted the offer "subject to the approval of our tea and coffee man." Is this contract binding?

5. Anderson offered Jackson his farm for $10,000, and promised to keep the offer open until Friday. The offer was revoked on Wednesday. Jackson accepted on Thursday. Must Anderson sell?

6. The seller offered the buyer a carload of potatoes at a specified price. The offer was to remain open until Saturday at noon. The buyer accepted the offer Friday noon. The seller died at noon on Thursday. Is there a contract? Why?

7. Pullman made the following offer: "I offer to sell you a carload of sugar at four cents a pound, and unless I hear

from you by next Saturday, I shall assume that you have accepted my offer." Pullman does not hear from his prospective buyer. Is the sugar sold?

8. Langford said to White, "I will sell you my roadster for $250." White made no reply at the time, but the next day he said, "I will take your roadster offered me yesterday for $250." Langford replied by saying the price is now $275. Is this a contract? Explain.

9. If, in the above case, White had said at once, "I will give you $225 for your roadster," and Langford shook his head "no"; and White then replied, "Well, I will give you the $250." Is this a contract? Explain.

10. An auctioneer was selling a dining room table on which Mrs. Scovill had bid $30. It seemed that the table had reached its peak price. Just before the fall of the hammer Mrs. Scovill called: "Cancel my bid!" The auctioneer refused and cried "Sold!" Is Mrs. Scovill under obligations to take the table?

CASE PROBLEMS
(Written or Oral)

No. 21

On June first, Byers received a letter from Alderson in which he offered Byers an automobile for $2,000, giving Byers two weeks within which to accept the offer. On June eighth, Byers wrote Alderson that he would give him $1,800 for the auto. Alderson did not reply. On June twelfth, Alderson received Byer's letter in which he accepted the original offer and inclosed a check for $2,000. Is this a sale?

No. 22

Bryant offered to sell to Dudley a fine set of law books for $165. Dudley understood Bryant to say $65 and replied, "Did I understand you to say $65?" Bryant in turn misunderstood, and supposing his offer was correctly repeated said, "Yes." You are to settle whether this is a contract. How do you decide? (74 Ill. 351.)

No. 23

Plaintiff wrote defendant Jones inquiring of him whether he owned certain lots, and if so what was the price. Defendant answered in the affirmative and named the price. Would this be considered equivalent to an offer to sell the lots?

No. 24

Dickens ordered an advertisement inserted in a daily paper for one week. The publisher continued to print the advertisement for one month after the time specified for publication had expired. Is Dickens liable for payment?

No. 25

A merchant wrote to a carpenter asking the latter to make certain office fixtures, offering to pay a specified price therefor, if he would begin at once and have the work completed within two weeks. The carpenter did not answer the letter, but immediately purchased the necessary lumber and other material and began working on the same in his own shop. The merchant thereafter wrote to the carpenter countermanding the order. On receiving this last letter, the carpenter brought suit for breach of the contract. In this particular case was there a contract and can the carpenter recover? Did the buying of the lumber and the beginning of the work indicate an acceptance of the proposal? (46 N. Y. 467.)

No. 26

Morgan wrote to Millet offering to buy the latter's house, located at 101 Broadway, for $10,000. Morgan signed the letter and also wrote at the bottom of the letter "Over." On the other side of the paper he said his offer was conditional upon Millet's accepting as part payment a house at Fifth and Main Streets, at a valuation of $4,000. Millet, in a hurry to close the deal, failed to read what was on the back of the letter, and wrote accepting the offer. Did their minds meet in contract?

Chapter VI

REALITY OF CONSENT

Keep in mind these questions when studying this chapter:

1. **What is the effect of mistake in making a contract?**
2. **Is there a difference between fraud and misrepresentation?**
3. **What is the meaning of duress?**
4. **How does undue influence affect contracts?**

§ 23. **Meeting of minds.**—One of the indispensable elements of an agreement is the apparent "meeting of the minds" of the parties, without which there can be no contract. The reality of consent, necessary to make a true agreement, is missing if the contract is due to any one of the following factors:

(1) Mistake.
(2) Fraud.
(3) Duress.
(4) Undue influence.

(1) *Mistake.*—An agreement entered into through a mutual mistake is voidable if the mistake relates to the identity of persons and things. If it is in regard to the value or quality of the subject-matter, the agreement is binding. If an agreement is entered into concerning something which, unknown to both parties, is not in existence at the time, there is no contract since there is no subject-matter. Where one of the parties offers one thing, and the other expresses his assent to another, there is no contract, for the minds of the parties have not met. In the absence of fraud, mistake as to the value of property, which is the subject-matter of a contract, does not affect the validity of the agreement.

July 2, L. J. Smith agrees to sell to K. R. Brown his country residence. Unknown to either party the property had been destroyed by fire on June 29. There is no contract—there is a mistake as to the existence of the subject-matter.

Defendant learns that there is a valuable vein of coal under plaintiff's land. Defendant buys the land without informing plaintiff of this fact. This is a contract, and will be binding on the plaintiff.

After defendant bought the land he discovers that the coal is worthless, and that he paid too much for the property as a consequence. Nevertheless, he is bound by the contract.

Plaintiff found a small stone and sold it for one dollar to the defendant. It afterwards developed that the stone was a rough diamond worth $700. At the time of the sale both parties were unaware of the character of the stone or its true value. The sale was held to be a valid one. (66 Mich. 568.)

A person has the right to select and determine with whom he will contract, and another person cannot be substituted without the first party's consent. When a business man sells his entire business to another, the buyer should inform the customers of the change in ownership, otherwise, if he attempts to fill orders coming to the original owner, he cannot hold the purchasers liable since they do not know the new owner, and are not bound by such contracts.

(2) *Fraud.*—A person who deceives another in making a contract is guilty of a fraud, and a fraudulent contract is voidable so far as the innocent party is concerned. It is against the spirit and policy of the law to permit the defrauding party to profit from his own wrong. To constitute fraud so that redress may be attained, it must be shown:

(a) That there was a false representation of a material fact. (The representation must relate to a past or existing fact);

(b) That the person who made the representation knew it was false (or made it recklessly without regard to its truth or falsity);

(c) That it was made with the intention of influencing and actually inducing another to act upon it;

(d) That it was actually acted upon by the other to his damage.

It is not necessary that the misrepresentation be in words. Acts and devices which create in the mind of the other party a mistaken belief in regard to the facts may effect the same result.

"Fraud consists in the employment of any kind of cunning, deception, artifice, or concealment to cheat, circumvent, or deceive another in a business matter."

The injured party may rescind the contract by returning the property and recover the money paid. If both parties are equally guilty, the law will not assist either one of them.

Since contracts affected by fraud are voidable, not void, it is only the defrauded party who can avoid the contract, while the other party is bound. If a party fraudulently acquires the property of another and sells it to an innocent purchaser, before the vendor disaffirms the contract, the buyer will get a good title. If a fraudulent contract was void, the result would be different; the buyer would not have title.

John Y. Brown represented to S. S. Stover that the former's land contained valuable deposits of ore. He thereby induced Stover to enter into an engagement to buy this land. This was a fraudulent misrepresentation.

If the misrepresentation consists in a matter of opinion or expression of intention, it will not invalidate a contract. A representation by a seller that the property offered for sale is worth a given sum is an expression of opinion and not the representation of a fact. A statement as to the cost of an article may be made under such circumstances as will justify the buyer relying on it as a statement of fact. One wishing to rely on statements should have them put in the form of written warranties by the party making them.

Fields bought a cash register on the statement of the salesman that it would save the expense of a bookkeeper, and part of a clerk's time. Field now claims these statements are false, and seeks to set aside the sale on the ground of fraud. The statement was a mere opinion; the buyer will be bound by his contract.

"I have the best furnace made for the money, and will sell it to you for $100." This is merely an expresson of opinion and will not affect the validity of the contract, even though the furnace is a very ordinary one.

A statement to a prospective purchaser of an oil-well that it will make the buyer wealthy is sales talk, and is not to be relied on. The property may be worthless.

(3) *Duress.*—Contracts to be binding must be entered into willingly and freely. If one party compels another, by means of threats or actual violence, to enter into an agreement, under such circumstances that he is deprived of his free will to act, it is said to be obtained under duress. It is evident that there is no real consent to contracts obtained in that manner. The party who gives his consent under such circum-

stances may avoid the agreement at his election. The duress may consist of either actual or threatened violence to the life, liberty, or property of a person, or to the life or liberty of any member of his family. The degree of danger or impending injury must be such as will be sufficient to sway the will of the average person. It must be inflicted by the other party to the contract, or by one acting with his knowledge and for his benefit.

A note extorted from a father whose son was a defaulter, in consequence of threats to prosecute the latter for embezzlement, was held to be voidable since it was obtained under duress.

(4) *Undue influence.*—Undue influence is similar to duress but differing in the means of accomplishing the purpose. Thus, agreements resulting from the unconscientious use of power arising out of a confidential relation, as guardian over his ward, attorney over his client, or from mental weakness or infirmity, for the purpose of obtaining some advantage, are voidable by the injured party. The law looks with suspicion upon transactions of this nature. This is also true between parent and child, if one of them is in a dependent condition.

The most common illustration of undue influence is the inducing of some aged or feeble person to sign documents which are favorable to the one exerting the influence, and which the former would not approve if he were possessed of his full powers.

If a ward should convey to his guardian, immediately upon becoming of age, valuable property for a very inadequate consideration, and should soon afterwards repent of his bargain, the responsibility would rest upon the guardian to show that the ward had been fully advised as to his rights.

At early common law, the means employed were used as a standard in determining whether duress was present. Unless the threats were sufficient to deprive a courageous man of his will power, duress did not exist. This absurd rule was later modified so that the means employed need be only sufficient to deprive a man of ordinary firmness of his will power. Today, duress is not determined by the means employed, but by the result of the threats in each particular instance. This is the best standard, for, obviously, one person is much more easily frightened than another, and the question, after all, is not how a person's will power is limited, but whether the person lacked freedom of will.

QUESTIONS FOR DISCUSSION
(Oral)

1. Gilbert wrote a letter to Sterling offering to sell his farm for $8,500. Sterling accepted the offer. Is Gilbert bound to sell if his stenographer had mistakenly written $8,500 instead of $8,900 the amount he dictated? What is the basis of your answer?

2. Macbeth agreed to buy, and Antonio to sell "these barrels of mackerel," pointing to five barrels standing in front of Macbeth's place of business. The barrels in question turned out to be salt. Is this a contract?

3. A very old man had been induced to indorse a bill of exchange upon the representation of the acceptor that it was a guaranty. Is the old man liable to the purchaser of the bill? (L. R. 4 A. P. 704.)

4. Plaintiff Hall was induced to enter into an agreement with the defendant to defraud others in a fake foot race, but the plaintiff became the victim and lost a large sum of money to the defendant, who made a practice of defrauding others by such schemes. Will the courts help the plaintiff recover his money? What particular maxim of law applies to this case? (See maxims on page 455.)

5. Wall sold his cottage at the lake to Simms, in December. Simms, having occupied this cottage the previous summer, made no further inquiry about the property. When he motored over to the lake the following summer, he found the building reduced to ashes. Upon inquiry he was told that the cottage "burned early last winter." Who suffers the loss? What is the test?

6. Forester, the owner of a mahogany log, rolled it over so as to conceal a hole. The purchaser brought suit against Forester. The latter argues that he made no false statement about the log. Result? (30 L. J. Ex. 337.)

7. An agent, in the course of an interview with the owner of a business, said that the cash register he was selling would

save the expense of a bookkeeper. As a matter of fact there was no such saving. Can the business man rescind?

8. Y bought a number of shares of stock in reliance upon a false representation by X. It was proved that the shares were worth as much as was paid for them. Can Y avoid the contract? (47 Minn. 225.)

9. A geologist knew that Sneider's land contained rich oil wells, a fact of which Sneider was ignorant. The former persuaded Sneider to sell him the land at a very low price. Is the latter bound by his contract?

10. Plaintiff bargained with a drowning man to save his life for $1,000. Is this agreement under duress, or is it a valid bargain?

CASE PROBLEMS
(Written or Oral)

No. 27

The Boston Ice Company supplied Mr. Potter with ice. For some reason he decided he wanted another ice man. Thereupon, Mr. Potter discontinued doing business with the Boston Ice Company, and made a contract with The Citizen's Ice Company to furnish ice for the season. Soon after, however, The Citizen's Ice Company sold its business to the Boston Ice Company, and the latter named company resumed delivering ice to the residence of Mr. Potter, who was ignorant of the change made until after the consumption of the ice delivered. It was held that the Boston Ice Company could not recover the price of the ice delivered. Explain why. (123 Mass. 28.)

No. 28

A lumber dealer, in footing up the items of an estimate, made a mistake of several hundred dollars in adding the different items. He also failed to take into account the freight charges. This made the total of the bill less than contemplated. The contractor accepted the dealer's bid. Before any lumber was delivered the dealer discovered his mistake. Is this a valid and enforceable contract? (10 L. R. A. 114.)

No. 29

Defendant agreed to buy from plaintiff a cargo of cotton, "to arrive on the vessel Peerless from Bombay." There were two such vessels sailing from Bombay, one in October and the other in December. The plaintiff had in mind the latter vessel and the defendant the former. Is the defendant bound to accept the cotton? If there had been but one "Peerless" and the defendant had said Peerless by mistake, meaning "Peri," what would be your decision? (84 N. E. Rep. [Ind.] 776.)

No. 30

King bought a promissory note from Black upon Black's assurance that Jones, the maker of the note, was wealthy. It later developed that Jones was insolvent, and Black knew this when he sold the note. Is Black guilty of fraud?

No. 31

During the negotiation for the sale of a salt well, the seller falsely represented to the buyer that it was free from gypsum and the brine 90 degrees strength, while in truth there was gypsum in the well and the brine was deficient in strength. Does this amount to fraud?

No. 32

Martin, while insolvent, fraudulently obtained goods from Rowley. Martin had no intention of paying for the goods. He sold the goods to Biglow, who was innocent of how they were originally obtained. Rowley brought a suit to set aside the sale and recover his property. Result? (12 Mass. 306.)

No. 33

A husband threatened to poison himself unless his wife signed a promissory note as surety. Is this duress or undue influence? (41 N. J. Law 48.)

Chapter VII

LEGALITY OF OBJECT

Keep in mind these questions when studying this chapter:

1. **What may be the subject-matter of a contract?**
2. **Why are some contracts forbidden by statute law?**
3. **What is usury?**
4. **Contracts against public policy are of what general character?**

§ 24. **Definition.**—The subject-matter of a contract, as here used, is the thing to be done, or that which is to be omitted. It is an indispensable element of every contract. Anything in its nature, possible and not forbidden or prohibited by law, may be the subject-matter of a promise. Illegality is never presumed; it is always assumed that a contract is legal until the contrary is shown.

§ 25. **Illegality.**—A contract is void if the subject-matter is illegal, immoral, or against public policy; otherwise it is deemed valid. The subject-matter may be declared illegal either by statute or by the common law. It is impossible and unnecessary to consider all the contracts forbidden by statute in the various states. Those of general interest may be classified as follows:

(1) Gambling contracts.
(2) Sunday contracts.
(3) Usurious contracts.

(1) *Wagering or gambling contracts* under the common law were valid, but the statutes of practically all the states have declared them illegal and void. A wager is a promise to give money or money's worth upon the ascertainment of some uncertain event. To constitute a wager, there must be mutual chances of gain or loss, and the uncertain event must be the

sole condition of the agreement. Hence, bets on races, elections, ball games, and the like, are not enforceable.

An agreement for the purchase or sale of stocks or commodities where neither party intends to deliver or accept them, but simply pay the difference in price according to the state of the market at a certain date, is gambling, and such contracts are not enforceable.

An agreement, however, for the sale of stocks or commodities to be delivered at a future time, although the seller at the time of the sale neither has them in his possession nor owns them, and must go into the market to purchase from a third party, is regarded as a legitimate transaction and is not considered a gambling contract.

Money deposited with a stakeholder can be recovered at any time before it is paid to the winner, even though the bet has been already decided. Bets once paid cannot be recovered, nor can the winner of the bet go into court and compel the payment of the money to him.

In Illinois the loser may bring suit within six months to recover whatever has been lost through gambling, unless otherwise provided by statute. In Nebraska, the wife, heirs, guardian, legal representative, or creditors of the person who shall have lost money or property through gambling, have a right to bring a civil action for the recovery of such losses. Undoubtedly other states have similar penal statutes.

(2) *Sunday agreements.*—Contracts made on Sunday are void, or are at least unenforceable in many of the states; like gambling contracts, they were valid under the common law, but are not so considered under statute law, which forbids work, labor, or business on Sunday, unless they relate to works of mercy, charity, or necessity. Contracts made on Sunday are not void if they are ratified on a secular day. They will also be good if delivered on a week day and to take effect from delivery and not from the execution of the contract. The dating of a contract on a secular day does not change its validity if it was executed and delivered on Sunday. Nor is an agreement void if it is entered into on a week day, but is dated, or to be performed, on Sunday.

Rebecca Cook discounted, on Sunday, a note made by one, Weston. For the proceeds of the note she gave a check, but dated it the next day. Weston indorsed the check on Sunday but did not present it to the bank for payment until three days later. The presentation and payment of the check on a legal day ratified the transaction and made a legal loan of the money. (44 Atl. Rep. 560.)

(3) *Usury.*—Contracting for the use of money at a greater rate than allowed by law is termed *usury.* A lower rate than that fixed by law may be legally agreed upon. If the parties fail to stipulate for any permissible rate, the legal rate will be the one that governs. In some states, a legal rate has been fixed and the maximum rate is left open. And also, in some states laws have been passed permitting loan associations, pawnbrokers, etc., to charge a higher rate than that of other business enterprises. A loan of money with an agreement to accept a portion of the profits is not usurious.

The following table shows the legal rate of interest and the limit allowed by special contract:

States and Territories	Legal rate Per ct.	Contract Rate Per ct.	States and Territories	Legal rate Per ct.	Contract Rate Per ct.
Alabama	8	8	Montana	8	10
Alaska	8	12	Nebraska	7	10
Arizona	6	10	Nevada	7	12
Arkansas	6	10	New Hampshire	6	Any rate
California	7	12	New Jersey	6	6
Colorado	8	12	New Mexico	6	10
Connecticut	6	12	New York	6	6
Delaware	6	6	North Carolina	6	6
D. of Columbia	6	8	North Dakota	6	9
Florida	8	10	Ohio	6	8
Georgia	7	8	Oklahoma	6	10
Hawaii	8	12	Oregon	6	10
Idaho	7	10	Pennsylvania	6	6
Illinois	5	7	Porto Rico	6	12
Indiana	6	8	Rhode Island	6	Varies
Iowa	6	8	South Carolina	7	8
Kansas	6	10	South Dakota	7	10
Kentucky	6	6	Tennessee	6	6
Louisiana	5	8	Texas	6	10
Maine	6	Any rate	Utah	8	12
Maryland	6	6	Vermont	6	6
Massachusetts	6	Any rate	Virginia	6	6
Michigan	5	7	Washington	6	12
Minnesota	6	8	West Virginia	6	6
Mississippi	6	8	Wisconsin	6	10
Missouri	6	8	Wyoming	7	10

National banks are allowed to charge whatever rate is permitted by the law of the state in which they are located. If a usurious rate has been collected, the party paying the same may recover twice the amount of interest paid.

In some states the right to compound interest in written agreements is permitted by statutes. Where permitted, such interest is not considered usurious.

Most statutes also permit banks to deduct interest in advance, in spite of the fact that such practice results in interest in excess of the legal rate.

Many professional money lenders avoid the usury laws by taking advantage of pawnbroker's interest rates in requiring a pledge from the borrower.

A loan for which the borrower paid the maximum interest, and in addition paid the mortgage registry tax upon the mortgage given to secure the same, is held not to be usury. (125 Minn. 218.)

(a) *Penalty.*—The penalty for usury differs in the several states. No attempt is made here to give the details. The statutes are the best source of information and should be consulted. In most of the states, however, provision is made for the recovery of double or treble the excess interest charged; in others, for the forfeiture of all interest.

§ 26. **Public policy.**—Contracts, the subject-matter of which is contrary to good morals, or is opposed to the public will and welfare of the state or community, are illegal as being contrary to public policy. The leading classes of agreements of this character, void, either by statutes or under the principles of the common law, are, namely:

(1) Contracts in restraint of trade.
(2) Contracts in restraint of marriage.
(3) Contracts obstructing public justice.
(4) Contracts tending to injure public service.

(1) *Restraint of trade.*—It is a well-settled principle of law that contracts in unreasonable restraint of trade are illegal; it is against the interest of society that a man should deprive himself of the right to exercise his skill in earning a living. The public is entitled to the advantage to be derived from the industry of a person in the occupation for which he is best fitted. Today, the main objection to such contracts is that they tend to create monopolies. Hence, agreements not to engage in a particular business anywhere at any time are unreasonable and unenforceable.

Frequently, the goodwill is the most important and valuable part of a business asset. It is right and proper that one who buys the goodwill of another should be protected in the enjoyment of that right by preventing the seller from re-entering into competition before the purchaser has established a reputation with the new trade. Restraint of trade, embraced by agreement under limitation as to time, persons, and locality, are not necessarily restraint of trade in the sense which renders the contract void. Therefore, agreements not to engage in a particular line of business within a reasonable distance or within a reasonable period are binding.

What may be a reasonable limitation in one case may be unreasonable in another. A contract by a lumber dealer in a small town, whose trade was confined to a small area, not to engage in business anywhere in the state would be void; whereas a contract by a wholesale dealer, operating throughout several states, not to compete with the purchaser in that territory, would be upheld.

Sales of existing business concerns to competitors, who have for their object the lessening of competition, the stifling of trade, and the creating of a monopoly, are illegal because they are in restraint of trade.

The court ruled that the agreement of a doctor not to practice medicine within eight miles of his former residence would not be in restraint of trade.

An agreement to form a partnership between grain dealers in a certain city for the purpose of controlling the price of grain in that locality would be void; it would be in restraint of trade, and against public policy.

(2) *Restraint of marriage.*—Agreements which have for their object the restraint or freedom of marriage are illegal as being against public policy. Contracts not to marry at all; or not to marry any person inhabiting the same town, county, or state; or of a particular trade or profession, are void.

Contracts in limited restraint may be enforceable, as a promise to marry or not to marry a particular person; or during minority, not to marry without the consent of parents, or guardian.

While the law favors marriage, it is opposed to matchmaking in consideration of compensation. Hence, promises to pay a third person for negotiating a marriage between two parties is void, and money paid for such service may be recovered.

(3) *Obstructing justice.*—Agreements, the object of which is to bind one to abstain from testifying as a witness

in a suit, to pay a witness more if the party succeeds than if he does not, or not to prosecute a thief if he returns the stolen property, are void.

Agreements encouraging litigation are likewise void. A contract between an attorney and client providing that the attorney is to prosecute a suit for the recovery of property or damages, in consideration of receiving a portion thereof as compensation for his services, is enforceable. But if the contract provides that the attorney is to defray the expenses and pay the costs, it is not enforceable.

(4) *Injuring public service.*—A promise to pay money, to furnish employment, or to render directly or indirectly any service for the purpose of unlawfully procuring legislation or corrupting voters is void. This, however, does not affect the right of petition guaranteed by the Constitution, nor is it to be understood that an attorney or other suitable person may not appear before a legislative or judicial body and present facts and arguments for the attainment of the object sought, and a promise to pay the person so acting will be binding.

One who circulates a petition for the appointment to office of a particular individual, or for the purpose of securing the pardon of a person convicted of crime, may recover pay for such services if there is an agreement to that effect. But a promise of pay to influence one in the signing of such a petition would be a violation of law.

A contract between two persons that they are to refrain from bidding against each other at a judicial sale, and that one should bid in the property, each paying one-half the purchase money, is against public policy and will not be enforced. (13 M. A. 361.)

QUESTIONS FOR DISCUSSION
(Oral)

1. Greene lost his watch on the way home from town. Wise said he could find it if Greene would tell him what route he had taken. Greene replied, "I'll bet you five dollars to nothing that you can't find it." Wise accepted the challenge, followed the route named, and found the watch. Was this a "bet" and can Wise collect?

2. All the gasoline dealers in Altrura entered into an agreement to sell gasoline at a price to be determined by a committee representing the organization. Later, one of the members "cut the price" to his customers The other dealers

then sought to recover damages for a violation of the agreement. They failed to recover damages. Explain why, in your opinion, such contracts should not be enforceable?

3. Adams bought a herd of cattle from Owens on Sunday. Delivery was to be made on the following Sunday. When Owens drove the cattle to Adams' premises the latter refused to accept them. What is your decision as to the legality of this transaction and the reasons therefor.

4. Allen and Tenant had a conversation on Sunday, during which it was agreed that Allen was to repair Tenant's automobile in exchange for the privilege of using it for one week. Tenant delivered the car on Monday morning and called for it the same day after it had been repaired. Tenant refused to live up to the agreement made on Sunday, contending it was an illegal contract. Allen sues Tenant for the work done. What is your decision in this case?

5. A has given B a note in which he promises to pay B in ninety days a certain sum, together with interest at the rate of sixteen per cent per annum. What possible objection is there to this contract? In what states would such a rate be permissible?

6. The Reliable Tank & Pump Company bought out the business of a competing corporation. The latter agreed not to re-open its business for a period of five years within a designated district. Why is this agreement enforceable?

7. Brown was engaged to pitch a game of baseball in Bingville. Under the agreement he was to receive $100 if he pitched the entire game; $75 if he pitched more than one-half of the game; and $50 if he pitched only one-half, or less. Seven innings were played when an officer of the law halted the game, enforcing a state statute which prohibited playing baseball on Sunday. How much is Brown entitled to collect?

8. A and B made a wager of $200 on the election of a mayor. They placed the money in the hands of X as stakeholder. After the election A, who lost his bet, demanded the return of his money from the stakeholder before the latter

paid it to the winner. What is the policy of the law in regard to the withdrawal of wagers? (19 Me. 335.)

9. Black was a candidate for office. He promised Green that if the latter would vote for him, he, Black, would see that Green was appointed clerk in the recorder's office. Green voted for Black, but Black secured the appointment of Brown to the clerkship. What are the rights of the different parties to the controversy?

10. The merchants and business men in a certain city organized a Commercial Club. One of the purposes of the organization was to procure the passage of laws which the members believed would be beneficial to their community. To this end, they employed an attorney to draft bills for introduction into the legislature; and to appear before committees to present arguments for the adoption of the proposed measures. After the attorney had performed his part of the contract, the club refused to pay his fee. He brought suit against the Commercial Club for his salary. Is he entitled to recover and why?

CASE PROBLEMS
(Written or Oral)

No. 34

Doe contracted with Roe that the latter should not import any salt to the Western Coast, that he should be vigilant in discouraging shipments by other parties, and to buy all his salt from Doe. Discuss the validity of this contract. (147 Cal. 115.)

No. 35

A, intending to purchase a piano, took Mrs. B with her, in whose judgment as to pianos A had great confidence. The piano dealer secretly promised Mrs. B a commission if A purchased a piano. The plan "worked" and Mrs. B now demands her commission from the dealer. Can she collect?

No. 36

A musical director of great prominence, entered into an agreement with a bank to permit the use of his name as a

director in that bank with which he had no other connection. Is such an agreement valid? (197 Pa. 305.)

No. 37

What is the effect of a contract entered into in the form of a partnership between grain dealers in a certain locality, the prime purpose of which is to form a secret combination to control the price of grain in that city? (79 Ill. 345.)

No. 38

For many years Recker had been engaged in the bakery business. On the first day of May he sold his entire business to Franz and agreed that for a period of ten years, under a penalty of $5,000, he would not engage in the same business within a radius of five miles from his former location. On the first of July, in the same year, Recker resumed the bakery business within a few blocks of his former location. Was the agreement of Recker binding? Can Franz recover any part of the $5,000 as damages, and if so how much? If Recker had agreed not to engage in this particular business anywhere in the state, how would this affect your answer? How, if he had gone into business in a neighboring city in the same state? (56 Pacific 249.)

No. 39

News Item: "Women Break Promise.—A broken promise yesterday cost J—— M—— $21. J—— M—— is a public chauffeur and was summoned by two women to drive them to a fire on the South side. 'Drive fast. If you get arrested for speeding, we will pay the fine,' they told the chauffeur. He was arrested, and when fined $25 and costs, the women said they would pay only $10 of the amount." Can the chauffeur collect the remainder from the women? Give reasons for your answer.

Chapter VIII

CONSIDERATION

Keep in mind these questions when studying this chapter:

1. **In regard to contracts, what is the meaning of consideration?**
2. **Is the need for consideration of much importance?**
3. **Does inadequacy of consideration affect a contract?**
4. **What is the effect of part payment in the discharge of a debt?**
5. **Can there be such a thing as an insufficient consideration?**

§ 27. **Need of consideration.**—It is a well established rule of law that a consideration is an essential element of all contracts, whether written or oral. It is said that consideration is the reason which moves the parties to enter into a contract. An agreement to do some act, or to pay something without receiving compensation of some kind in return—a promise to give something for nothing—is unenforceable, although the promise may be admitted.

In the English courts, in early times, the courts were willing to require persons to perform all the promises they made. These courts recognized, however, that promises were often made in jest, or without thought and deliberation. They began, in time, to seek some evidence that the one who made the promise had weighed the consequence and had "considered" his promise—that he had seriously meant it as a promise, hence, the term *consideration.*

If Richard Roe should promise to give John Doe a new suit of clothes as a gift, and afterwards refuse to perform his promise, the law would not compel Roe to make good, there being no consideration. If, however, Doe agrees to work for Roe, regardless of the length of time, and the latter promises Doe a suit of clothes in payment, it would be an enforceable agreement, there being a consideration for the promise.

Consideration is the prime element that distinguishes a contract from a gift. A promise to make a gift cannot be enforced in law. However, a gift having once been made, cannot be recalled.

A father gave a deed to his farm to his children as a present. He afterwards sought to have the deed set aside because there was no consideration. The court held that natural love and affection was a good consideration, and the deed was a valid conveyance. (142 Ill. 160.)

(1). *Seal.*—At common law, it was conclusively presumed that consideration had been given in case of a sealed contract. A gratuitous promise under seal was enforceable. The tendency has been to depart from this view; some states hold that a seal only raises a presumption of consideration, which may be rebutted; others declare that a consideration must be proved in case of a sealed contract, as in the case of simple agreements.

§ 28. **Definition.**—Consideration may be defined as something that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, detriment, suspension, or forbearance of a right suffered by the one party to the advantage, profit, or interest of the other will be regarded as a consideration.

The consideration need not necessarily consist of money or property. It may be work, it may be a promise to do or not to do some particular act, or it may be any one of an unlimited number of things.

Brown sold Smith a hat for $5. The consideration was the money paid for the hat.

In an advertisement, the makers of a remedy for influenza offered to give a large sum of money to anyone who would use their remedy for a specified period and thereafter contracted this disease. A lady used the remedy and afterwards caught influenza. Her compliance with the prescribed conditions was held to be consideration for the promise. (L. R. 1 Q. B. 256.)

§ 29. **Detriment.**—The word *detriment* means the doing, by the one making the promise, of something that he was not legally obliged to do. Obviously, then, it is not a detriment for one to forbear doing that which he is under duty bound to perform, and an agreement of that sort would fail for lack of a consideration.

An uncle promised his nephew $5,000 if he would refrain from drinking liquor, using tobacco or profane language, or playing cards until his twenty-first birthday. The young man agreed to do so and complied

with his promise, but the uncle claimed the agreement was not founded on a valid consideration. The court held that there was a sufficient consideration for the promise in refraining from doing those things which might be ethically wrong but legally right, and awarded the nephew the money. (124 N. Y. 538.)

Brown, a merchant, promises to pay Smith, a clerk, $100 at the end of the year if the latter is honest; Jones offers Black, a fireman, $50 if he will save the former's building from loss by fire. Neither Smith nor Black can recover the amount promised. Where one is already required to perform some act or duty. his promise is not a legal consideration.

§ 30. **Adequacy.**—It is not essential that the consideration be adequate in point of actual value. If it has a legal value, it makes no difference how small that value may be. The courts will not inquire into the adequacy, unless there is evidence of bad faith or fraud. Nor will the courts assist in the making of bargains or to avoid the consequence of a "bad bargain." If one agrees to "pay too much for his whistle," he will have to make the best of it without the help of the law. Hence, the delivery of the most trivial article, or the doing of some insignificant act at the request of another is sufficient consideration for paying large sums of money. But a consideration grossly inadequate would be regarded with suspicion.

§ 31. **Mutual promises.**—A consideration based upon mutual promises is valid. The promise of the one party is the consideration for the promise of the other. A mutual promise to marry is a common illustration.

This principle is sometimes applied to the signing of a subscription paper in which a number of persons unite in agreeing to pay the amount set opposite their names for the purpose indicated in the paper. The promise of each to pay the amount subscribed is a consideration for the promise of the others, as where a number of persons subscribe for the purchase of stock for the purpose of organizing a bank or other business undertaking.

The principle is also applied in cases where the subscription is for a charitable, religious, educational, or public enterprise. The difficulty in such cases, however, is that the promises are not concurrent in time, and are frequently not given in return for each other. Some courts imply a promise on the part of the persons in charge of the fund to perform certain acts. Others hold the consideration is supplied when

the organization incurs liabilities in furtherance of the object the donors intended to promote. Or, if the terms of the subscription are that a definite sum is to be raised, the completion of that amount will constitute a consideration. Although the courts vary as to what constitutes the consideration, they almost uniformly hold these contracts to be binding.

FORM OF A SUBSCRIPTION BLANK FOR A BUILDING FUND

HELPING HAND AND Y. M. C. A. BUILDING FUND

....., 19—

For the purpose of providing an up-to-date building for the Helping Hand Institute, to cost $100,000; a modern building for the Young Men's Christian Association, to cost $100,000; and to furnish and equip the Street Boys' Annex, to the present Young Men's Christian Association building at a cost of $25,000; and in consideration of the subscriptions of others—I hereby agree to pay to the Treasurer of said fund the sum of ..... DOLLARS, upon condition that $225,000, or more, be subscribed for the above-named purposes by February 7, 1929.

Signed.....

§ 32. **Part payment.**—The payment, or the promise to pay, less than the amount due on an undisputed indebtedness is no consideration for the release or extension of the remainder of the debt.[1] This rule has often been severely criticised but is followed in most states. In some states, however, the doctrine is abolished by statutes.

Under the common law, when the courts can find that something has been surrendered in addition to the payment of a lesser sum, the contract is held binding. While in such cases the rule set out above does not apply, they may be classed as qualifications to the doctrine. Instances where the rule does not apply are as follows:

(1) Payment of a part before the debt is due, or at some other place than originally agreed upon will be an adequate

[1] The common law rule that the payment of a lesser sum than is due does not support a promise to release the entire debt has been changed by statute in Alabama, California, Georgia, Maine, North Carolina, South Dakota, Mississippi, New Hampshire, Tennessee, and Virginia. However, the old rule still prevails in the majority of the states.

consideration. Here a right is surrendered in addition to the part payment.

(2) If the amount of the debt is in dispute, the payment or promise to pay a less sum will be a sufficient consideration. In this instance, the debitor gives up his right to go into court.

(3) The giving, or promising to give something other than money, regardless of its pecuniary value, will be a consideration for the satisfaction or extension of the debt.

Smith tells Brown that if he will pay $500, he need not pay the remainder of a debt, amounting to $100, which is not in dispute. Brown pays the $500, but Smith may recover the other $100 for lack of consideration, since Brown was doing only that which he was legally obliged to do.

If Smith had made it a condition that Brown was to pay the money in Jonesville when the debt was due in Harlem, or that he was to pay it one day before it was due, or that he would accept $500 in cash, and a necktie for the other $100, there would have been a consideration, and Smith would have been fully discharged from his indebtedness.

§ 33. **Invalid consideration.**—There are certain apparent considerations that have been declared invalid to enforce a binding contract. They may be classified as follows:

(1) Moral consideration.
(2) Past consideration.
(3) Impossible consideration.
(4) Illegal consideration.

(1) *Moral obligation.*—A moral duty is not a sufficient consideration to uphold a promise. It is the moral duty of a son to support his parents if they are in need, but a promise of that character is of no more legal worth than if made by a stranger. Time can never remove the moral obligation to pay a lawful debt, although certain statutes, or a discharge in bankruptcy, may remove the legal obligation to do so.

(2) *Past performance.*—A promise to pay for some gratuitous service already performed—as gratitude for past favors—is not enforceable. The one who did the act suffers no detriment on the strength of the promise. A debt of gratitude cannot be transferred into a debt at law.

If one voluntarily saves the life of another from an attack by robbers, or his property from loss by flood, or pays his friend's debts, or

does any other kindly act, without a previous request, the subsequent promise of the recipient cannot be enforced; it is an insufficient consideration. "Perhaps it is better for the public," according to a learned justice, "that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."

(3) *Impossibility.*—An agreement based upon a consideration which is physically impossible is not binding. To be physically impossible it must not be within the limits of human possibility. A lack of funds, or foresight, or that it is merely difficult, is not a legal excuse for a failure to act. If the act was once possible and afterwards becomes impossible, the party failing to perform would have to make the contract good by paying damages. A promise to discover perpetual motion or to sail away to the moon is not valid.

(4) *Illegal consideration.*—The consideration is void when it is a promise to do an act contrary to law. The law will not enforce contracts against itself; an agreement to commit a crime being illegal, either party may avoid the contract. Promises contrary to good morals or binding one to abstain from some unlawful conduct are, therefore, classified as invalid considerations.

QUESTIONS FOR DISCUSSION
(Oral)

1. An aunt promised to give her niece a wrist watch when the latter became of age. This promise is not enforceable. Why?

2. The aunt gave her niece the promised watch on Monday. Having heard that the niece circulated some uncomplimentary stories about the donor, she demanded the return of the watch on Tuesday. Result?

3. Your grandfather promises to give you a new typewriter if you will finish your business course. Is this promise enforceable upon completing the course? What is the legal detriment which you suffer in doing as requested?

4. Shirk promised to give his nephew an old tractor if he (Shirk) sold his farm. Soon thereafter he sold the farm, and refused to give the tractor as promised. What are the rights of the nephew?

5. Tompkins bought a watch from a jeweler without conditions as to quality or service. A month later Tompkins complains to the dealer about some deficiencies in the watch. The dealer then warrants the watch in every respect. What is the legal effect of such a warranty?

6. Walker was given a judgment against Grubbs for $800. He agreed to release Grubbs from this judgment for $500. Grubbs accepted the offer. Walker died, and several years after his death, Walker's administrator sues Grubb for the unpaid $300. Can he collect?

7. C. H. Rich subscribed $100 to be used in repairing a church. This sum was subscribed on condition that $1,000 be raised for that purpose. The amount was subscribed. Rich now refuses to pay his subscription arguing there was no consideration for his promise. Who wins? (168 Mass. 413.)

8. Antonio, having a grievance against Shylock, made arrangements with Grafter, publisher of a newspaper, to pay him $100 if he would publish libelous stories concerning Shylock's character. Grafter published the stories, and now seeks to collect from Antonio. Must Antonio pay? Why?

9. Defendant Green said to plaintiff: "I do not know whether I owe you or not, but if you make an affidavit that I do owe you so much money, I promise to pay you." Plaintiff made the affidavit, but in court the defendant offered to prove that it was false. Was there a consideration here? What is it? (18 Johnson [N. Y.] 337.)

10. X promises to pay your expenses if you travel to Yellowstone Park and back. You make the trip. Will X have to pay the expenses? (69 Md. 199.)

CASE PROBLEMS
(Written or Oral)

No. 40

A grocery company rendered a bill to one of its customers for $260. The customer disputed the claim and maintained the bill should have been $240. They finally compromised on $250. Is this compromise enforceable? (55 Wis. 354.)

No. 41

Rogers, a wealthy New York business man, on his way home found an injured man in the street, the victim of a hold-up. Rogers called a physician who performed an operation to save the man's life. The doctor sent his bill to Rogers. Must he pay? (20 Johns [N. Y.] 28.)

No. 42

A policeman arrested a criminal for whose capture a reward of $500 had been offered. Can the officer collect the reward? (10 Pa. St. 39.)

No. 43

A sailor was promised an extra reward aside from his wages if he would remain with an unseaworthy vessel. Is this an enforceable agreement? (3 F. & F. 176.)

No. 44

Jefferson was under a contract of employment to work for Cooper for $60 a month for a year. After working for Cooper two months Jefferson received an offer from a third party at $75 a month. Cooper agreed that if Jefferson would stay and perform his work according to the original agreement, that he would pay the latter $150 as a bonus at the end of the year. Jefferson brought suit at the end of the year for the additional $150 promised him. Is Cooper's promise enforceable? Why? (117 Ga. 504.)

No. 45

An architect contracted to prepare plans and superintend the erection of a large building. Upon learning that a certain part of the building contract he had himself hoped to secure had been given to another, he became very angry, took his plans home, called off his superintendent, and quit. The owner of the building then promised to pay him a commission of 5% additional as an inducement for him to resume work upon the job he had previously contracted to do. Can he recover for any part of the work, and, if so, how much? Give reasons for answer. (103 Mo. 578.)

No. 46

Regal, a rich banker, promised his nephew that if the nephew would name his son after the banker that the latter would pay him $5,000. The nephew accepted the offer and named his son as proposed. Will the banker have to pay the amount promised? What is the consideration? (124 N. Y. Appellate 538.)

No. 47

The following inquiry was received by a teacher of commercial law: "Sometime ago we supplied six ice boxes to a customer at an agreed price. There was no question about the amount to be paid, and so far as we know the ice boxes were satisfactory in every respect. Now, we have received a letter from the customer stating that he cannot pay the bill in full, but is enclosing a check for 60 per cent of the amount. If we accept this check and sue him for the balance will we be within our rights? What would be your decision?

No. 48

A mother paid for her son's education, with no agreement that he was to repay the money. Years afterward, the son voluntarily gave his mother a note in consideration of the money she had advanced to him. Can the mother collect payment on the note when due? (70 W. Va. 38.)

Chapter IX

STATUTE OF FRAUDS

Keep in mind these questions when studying this chapter:

1. **What is the prime purpose of the Statute of Frauds?**
2. **How does this statute tend to prevent fraud?**
3. **What contracts, in particular, are involved in this Act?**
4. **How may such contracts be made enforceable at law?**

§ 34. **Introduction.**—While the law does not prescribe the form of simple contracts, certain agreements, to be enforceable at law, must be attested by a note or memorandum in writing, and signed by the party, or his agent, sought to be held liable. This was not always so. There was a time when all contracts might be proved by oral testimony. Few contracts under the common law were required to be in writing, or to be proved by written evidence. Then, too, the parties to a lawsuit were not permitted to testify for themselves. This often led to the hiring of witnesses to give false testimony. Oral testimony is not only dangerous on the ground of unreliability but there is a temptation to false swearing. Witnesses sometimes die, forget, or move away.

In order to prevent fraud and perjury in the proving of certain contracts before the courts, the English Parliament in 1676 passed a statute to prevent frauds and perjuries, now familiarly known as the "Statute of Frauds." This statute provides that certain contracts must be in writing to be enforceable. Unless the law specifically requires a contract to be in writing, it may be oral. It does not provide that these contracts are void, but only voidable. The party who has not signed the agreement may elect, if he chooses, not to carry out his part of the agreement.

It is the design of the law to protect men, in their business dealings with each other, by reducing the opportunities of those who are inclined to be dishonest or unscrupulous. On the other hand, we are liable to defects of memory; within a short time after the occurrence of a business transaction, misunderstandings and differences of opinion are apt to

arise; witnesses die, causing contracts of certain kinds to be more or less difficult to prove.

It may seem strange that in early times the parties to a contract could not personally be witnesses to its proof. This was thought to aid in the securing of perjured witnesses when proof was necessary. Dishonest persons were induced, for a money consideration, to swear falsely as witnesses. In this connection, it might be remarked that no law is so effective as to be incapable of abuse in unscrupulous hands.

§ 35. **Provisions of statute.**—The two sections of the English Statute of Frauds which have to do particularly with business transactions are contained in the (1) fourth, and (2) seventeenth sections. The substance of these statutes has been adopted, with slight variation, in nearly all the states of the Union. The fourth section has been followed more uniformly than the seventeenth section. The variations are more pronounced in respect to the latter section.

(1) *Fourth section.*—Under this section, it is provided that unless an agreement is in writing and signed by the party to be charged, or by some other person lawfully authorized to act for him, no action may be brought in the following cases:

(a) To charge any executor or administrator upon any special promise to answer for any debt or damages out of his own estate; or,

(b) To charge any person upon any special promise to answer for the debt, default, or obligation of another person; or,

(c) To charge any person upon any agreement made in consideration of marriage; or,

(d) Upon any contract made for the sale of lands, tenements, hereditaments, or any interest in or concerning them; or,

(e) Upon any agreement that is not to be performed within the space of one year from the making thereof.

(a) *Executors and administrators.*—This clause relates to the promise of an executor or administrator to pay a claim against the estate he is administering out of his own estate. It is the duty of these persons to settle the estates of deceased persons. They are not personally liable for any of the debts of the estate. Should they, however, undertake to pay a claim

made against the estate out of their own estate, such a promise, to be binding, would have to be in writing and be signed by them.

(b) *Promise to pay the debt of another.*—A person is always liable on his promise to pay his own debts; but he is not liable for a promise to pay the debt or default of another unless such an agreement is in writing. (This topic will be discussed more fully in another chapter under Guaranty and Surety. See § 104.)

If two men enter a store, and the one buys, and the other, in order to enable the customer to secure credit, says to the seller, "Let him have the goods. If he does not pay you I will." This is a promise to pay the debt of another, and must be in writing. But if he says, "Let him have the goods, and charge them to me," the speaker is regarded as the actual buyer, and it is binding even though not in writing.

(c) *Agreement in consideration of marriage.*—There is a distinction between promises to marry and promises in consideration of marriage. This clause relates to agreements to pay money or settle property on another in expectation of marriage, where the marriage is the consideration for such a promise. A contract to marry does not come under this subsection, although it may come within the provisions of subsection (e).

It frequently happens that when a man is possessed of considerable property, before the woman will marry him, he agrees to settle a part of this property upon her for her protection and support. Such agreements must be in writing.

(d) *Contracts involving real estate.*—In ancient times, real property was conveyed by the grantor and the grantee entering upon the land, and in the presence of witnesses, the former handing the grantee a twig or clod of earth as a symbol of the delivery of the land, thus passing title. The statute changed this by requiring that an agreement whereby one party agrees to sell land, or any interest therein, must be in writing.

Adams agreed to sell his house and lot to Black for $8,000. All the details were practically settled. The agreement was not in writing—it was oral. Before the deed was executed, Adams had an offer of $10,000 from another buyer, which he accepted. Blank consulted a lawyer in regard to bringing a suit for damages. He was advised that agreements for the purchase of real estate must be in writing to be enforceable, hence, he had no legal grounds for bringing a suit for damages.

(e) *Performance within a year.*—This clause relates to contracts that are not to be performed within one year from the making thereof. The test is not whether it is actually completed within the year, but whether, within the contemplation of the parties, the contract is capable of performance within the year. If the agreement is absolutely impossible of performance within a year, or provides by its terms for a longer period, it comes within the requirements and must be in writing. If it may or may not be performed within a year, it need not be in writing.

An agreement to support another for life, or an indefinite period, or do any other thing possible to be done within a year, although the doing may continue and be expected to continue longer, need not be in writing. But an agreement to support a child three years old until he attains his majority would have to be in writing.

Long made an oral agreement with Bell to "float out" a certain quantity of logs at so much a log. There was no agreed time as to when the contract should be completed. This would all depend upon the condition of the waterway and the speed with which Long might work. The contract being one that could be performed within a year, it need not be in writing to be proved.

An advertising expert orally entered into an agreement on January 15, with a newspaper to act as manager for one year, employment to begin February 1. When the defendant was sued upon this agreement he successfully plead as a defense that the contract was oral, and that it could not be performed within a year from the time it was made.

(2) *Seventeenth section.*—This section pertains to the sale of personal property. Its provisions require certain contracts for the sale of goods, wares, and merchandise over a certain amount to be in writing. There are, however, a few exceptions. It will be considered in detail in the chapters devoted to that subject. (See § 122.)

§ 36. **Note or memorandum.**—Contracts in which the Statute of Frauds is involved must have competent parties, agreement—offer and acceptance—legal subject-matter, and consideration; if any one of these essentials be absent there is no contract. The writing or memorandum must state the contract with reasonable certainty, so that terms, price, and all necessary data can be ascertained.

The memorandum may be a note in pencil, a printed form filled in, or a single formal instrument. It may even be a series of letters or telegrams, provided they are related so as to disclose the essential matters, and establish a contract.

Signing of memorandum.—Only the party sought to be held need sign the contract, or someone by him duly authorized. Both parties need not sign it. Prudent business men will insist that each party sign agreements coming within the provisions of this statute. Too much care cannot be exercised in giving attention to business details, although they may not be legally necessary.

Gault, the plaintiff, owned a house and two lots in Wyandotte, Michigan, which he contracted to sell to Stormont, the defendant. The defendant paid Gault $75 down, and plaintiff gave him a receipt as follows:

"Wyandotte, April 26, 1881.

Received from George Stormont the sum of seventy-five dollars as part of the principal of ten hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city.

David Gault."

Gault was unable to give a deed to the property because his wife would not join therein, and Gault then brought suit against Stormont for possession of the property which he had allowed Stormont to enter.

The court held that there was no written evidence of the sale of the lots except the receipt which was given for the $75, and that was insufficient to answer the Statute of Frauds since the memorandum must be complete in itself and leave nothing to rest in parol. (51 Mich. 636.)

QUESTIONS FOR DISCUSSION

(Oral)

1. Does the law permit the making of oral contracts? Are such contracts just as enforceable as written contracts?

2. An eminent judge once said: "The Statute of Frauds is one of the wisest laws on our statute books." Just what did he mean?

3. Does a statute of this kind tend to decrease litigation?

4. If Adam Bede should orally agree to sell you the sod on his land to be cut and removed by you, and should afterwards change his mind and refuse to carry out the agreement, what would your rights be in this matter?

5. June 1, John Doe and Hannah Roe mutually agree to marry on July 4, of the next succeeding year. Must this agreement be in writing? Under what circumstances must a promise to marry be in writing?

6. In the presence of three witnesses Mason, orally agreed to sell Amos Wells a sixty-acre farm as soon as Mason moved to the city. The price was fixed at $8,000. Mason remained on the farm for twenty years after the agreement was made. The witnesses had died. Mason was feeble, and the age of Wells affected the retentive powers of his mind. What difficulties might present themselves if such a contract would be valid?

7. The deceased was indebted to his grocer in the amount of $105. The administrator, being informed that the grocer, unless paid, would cease to deliver food to the family of the deceased, called on the grocer and personally promised to pay the amount due. The estate was insufficient to pay the obligation. Can the grocer recover from the administrator?

8. In return for a promise to support her until death, a mother promised her daughter $10,000. The mother was fifty years old at the time of making the contract and in the best of health. The administrator refused to pay the daughter the amount promised after the mother's death (she lived to be sixty-five years old) contending that this contract, extending over a period of fifteen years should be in writing. Result.

9. Mr. Willis brought his fifteen-year-old son to the Palace store and requested the merchant to give the boy a new suit saying, "This boy has earned some money and will pay you. If his funds are not sufficient, I will pay the difference." The father now seeks to avoid payment, arguing that the promise must be in writing to comply with the Statute of Frauds. Is the father correct?

10. Hinckley agreed to work for Chase for one year. This agreement was made October 1, and Hinckley was to begin work on the following Monday. He began work at the time specified and worked for one week and was then discharged. This agreement was not in writing. Under the Statute of Frauds, is it enforceable? (126 Wis. 75.)

11. A and B agreed to exchange farms. They did not sign a written agreement to that effect. Can either party be held liable for damages if he refuses to complete the deal? Why?

12. Jones agrees in writing to buy Blackacre Farm from Harrison. The latter does not sign the agreement. What are the rights of the parties?

CASE PROBLEMS
(Written or Oral)

No. 49

In an exchange of letters by a young man and woman, an agreement was reached whereby the woman was to receive a goodly portion of the man's property upon their marriage. The young man failed to carry out his promise after the marriage. Is the woman entitled to recover? (99 N. Y. 29.)

No. 50

Erickson sold Kirk, under an oral agreement, all the ore in the ground, and the fruit on the trees of his farm. Kirk was to gather the fruit and dig the ore. Is this an enforceable agreement? (50 Oh. St. 57.)

No. 51

After an auction the following memorandum was made:

"Sold three articles to John Smith
One for $50.
One for $75.
One for $60.
(Signed) John Doe, Auctioneer."

Is this memorandum sufficient to bind the parties?

No. 52

Ben Johnson wishing to buy a suit of clothes, Boswell, his friend, said to the merchant: "Let Johnson have the clothes, and if he does not pay you I will." Must such a promise be in writing to hold Boswell liable? If Boswell had said, "Let Johnson have the suit of clothes, and I will pay you next week," what would your answer be? In what respect does the first proposition differ from the second?

No. 53

Blight, a fruit grower in Red Valley, Oregon, made an oral agreement to deliver to Young & Co., in St. Louis, his entire apple crop for two successive seasons. The crop was delivered the first season according to agreement, but the second season, Blight, for reasons best known to himself, refused to deliver any of his crop. Can Young & Co. recover damages for breach of agreement? Explain your reasons.

No. 54

Allen orally agreed to sell a certain farm to his brother William for $5,000. William paid part of the purchase price at the time of making the agreement. Later Allen refused to make a deed and William sued him for the property. What in your opinion should be the result? (7 Pa. 157.)

No. 55

Andrews sold, by auction, a tract of land. The only memorandum or note of the sale was made by the auctioneer. The note complied with the Statute of Frauds in describing the property, the price and terms, and gave the name of the buyer but failed to name the seller or owner. The seller refused to carry out the contract, and the buyer brought suit. Is the buyer entitled to recover? (26 N. E. Rep. 758.)

Chapter X

OPERATION OF CONTRACTS

Keep in mind these questions when studying this chapter:

1. **May one party be substituted for another in the performance of a contract?**
2. **In general, what is the meaning of the term assignment?**
3. **How are contracts assigned?**
4. **Who may make assignments of contracts?**
5. **What contracts may be assigned?**

§ 37. **Parties to a contract.**—The forming of a contract creates legal rights and corresponding obligations. After its formation, no one but the original parties are bound by it, or are entitled to the rights under it. It is reasonable that he who makes a promise should perform; likewise, that the one who gives the consideration should receive the benefit.

To the foregoing rule there are some exceptions. The contract itself may provide that either party may substitute another in his place. The custom and usage of business may also permit this substitution. A contractor agrees to build a house. It is well understood that he will not do all the work himself; that he may sublet parts of it to other builders. In this latter case, those employed under the original contractor would hold him and not the owner liable.

Contrary to the common law of England, most states permit the beneficiary of a contract to bring an action in case of default.

Brown owes White $50. Brown delivers a watch to Green in consideration for Green's promise to pay White $50. Green fails to pay White who therefore brings action. He is entitled to recover. (20 N. Y. 268)

§ 38. **Assignments of contracts.**—The transfer of one's property rights is termed an *assignment.* The person making the assignment is called the *assignor*; the one to whom made, the *assignee.* A party may transfer or assign many of his property rights under a contract, but not his duties or lia-

bilities. The assignment may be by agreement or by operation of law.

Grover sold his grocery store, goodwill, fixtures and accounts outstanding against his customers to one named Gates. This assignment of outstanding debts would be enforceable and Mr. Gates could proceed at law to collect them if such procedure should be necessary. But Mr. Grover would be liable for his debts to creditors if Gates failed to pay them.

Contracts for personal service cannot be assigned. If an author agreed to write a book for a publisher he could not assign his contract to a third party. The contract called for the personal work of a particular person; it could not be transferred.

Wilcox agreed to work Kruger's farm on shares. Mrs. Wilcox was to cook and wash for Kruger, and all the parties were to work together. Shortly after entering into the agreement, Mrs. Wilcox took her family and left the farm. The husband then made arrangements for his father and mother to move on the place, and assigned to them his contract. The old folks were willing to do the work, but the contract being one of personal service was held not assignable. (39 Mich. 94.)

§ 39. **By operation of law.**—When a man dies, his personal property passes, by operation of law, to his representative, termed an administrator or executor, who settles up the estate. This representative, on behalf of the estate, acquires the rights and liabilities of the contracting party who dies.

Faxton contracted to build a house for Moore. While the house was in process of erection Faxton died and Long was appointed his administrator. The latter would be required to complete the building.

§ 40. **Rights acquired by assignee.**—When the rights under a contract are assigned, the assignee gets the rights of the assignor, but no more. The other party to the contract may make any defenses against the assignee that he had against the assignor.

Paxton agreed to build a house for Moore for $6,000, according to certain plans and specifications. During the process of construction, agreed changes were made which reduced the cost of the building to $5,300. Paxton assigned his rights to the contract price, after the house was completed, to Jones, who would be entitled to collect the latter sum and not the original contract price. The defense of Moore against Paxton is good against Jones, the assignee.

§ 41. **Notice.**—As soon as an assignment is made, notice should be given to the other party. If the debtor is not in-

formed, he will be justified in believing that he owes the original creditor, and payment to him will satisfy the debt. However, the assignment is valid between the parties as soon as it is made.

§ 42. **Form of an assignment.**—No particular form is necessary. The following will pass all the rights of the assignor:

> Houston, Texas, August 11, 19—
> For value received, I hereby assign to Richard Roe all my right, title, and interest in the within (account, contract, or whatever the instrument may be).
>
> *Richard Style*

§ 43. **Protection to contracts.**—The Constitution of the United States stresses the importance of contracts. Among the several limitations imposed upon the states by the Constitution is one which prohibits any law impairing the obligation of contracts.[1] The contracts intended by the Constitution have reference to all those over which the states have authority, and includes the contracts of the state itself. This prohibition is aimed at the legislative power of the state, and not at the decisions of its courts.

If Stone owes Brown a certain sum of money on which he has agreed to pay eight per cent, a lawful rate of interest, the legislature could not reduce the rate to four per cent on this contract. If Stone owed Brown a debt, however, and judgment was recovered for the amount of the claim, and the law at the time of the judgment allowed eight per cent interest as damages on unpaid judgments, the state may pass a law reducing the rate of interest on such judgments.

Dartmouth College Case.—This is a historical case illustrating the principles involved in impairing obligations of contracts. It appears that, in 1769 the King of England granted a charter to Dartmouth College, in New Hampshire, specifying the number of trustees, how they were to be elected and hold their offices, what powers they should have and what duties they should perform. In 1816 the legislature of New Hampshire passed a statute attempting to amend this charter in impor-

[1] Const., Art. 1, Sec. 10.

tant particulars, making many changes in the organization of the college. The corporation refused to accept the changes and brought suit against those who took possession under the amendments to the charter.

The Supreme Court of the United States held that the charter was a contract, made upon a valuable consideration, for the security and disposition of property, and the state had no right to pass this statute which impaired the obligation of contract, thus violating the national Constitution. (4 Wheaton 518.)

QUESTIONS FOR DISCUSSION
(Oral)

1. Skiff voluntarily paid Stout's grocery bill. Is Stout legally liable to Skiff? (38 W. Va. 398.)

2. Rice had a contract to work for Price for one year, salary $150 per month. Can Rice assign this salary to Jaundice before it is earned? Can it be assigned after earned without the consent of Price?

3. Why should one not be allowed to assign his contracts for personal service?

4. Sargent was engaged to paint Wilson's portrait. Could Sargent assign the work of painting the portrait? Can he assign his right to the money due for the painting?

5. How may contracts be assigned by operation of law?

6. A merchant, being in urgent need of money, assigned certain book accounts to Grant. Such an assignment is legal. Doe, whose name is on the merchant's book as a debtor claims he does not owe anything. Another debtor, having no knowledge of the assignment, pays the merchant the amount he owes and receives a receipt for it. What are the rights of Grant in each case?

7. What is the justification for the rule that the assignee must give notice to the debitor?

8. Lyons engages Spring to work one year on his farm for an agreed sum. Before the expiration of the agreement Lyons

dies. Would you say that Spring must keep on working or would he be entitled to quit? (119 N. Y. 109.)

9. Dupuy, an attorney-at-law, made a contract with Williams to look after all his legal interests in reference to perfecting title to certain lots Williams owned. Before performing his part of the agreement, Dupuy assigned all his interests in the contract to Sloan, a very capable lawyer. Williams refused to permit Sloan to carry out his part of the assignment. May he rightfully do so? (138 Ill. 43.)

10. Gray and Small mutually agreed to form a partnership each investing $5,000. Small developed a bad case of rheumatism soon after the agreement was signed. He transferred whatever rights he had under the contract to Whitley. Gray refuses to live up to his part of the contract. What are Whitley's rights against Gray?

11. A promised to marry B June 15. This promise was broken by A. Several days after the breach B became seriously ill and died. B's executor seeks to recover damages for the breach of promise from A. In your judgment, will he be successful? (105 Eng. Rep. Re. 433.)

12. A owes X $1,000. X assigns $100 of this debt to each of ten different persons. May each one of the ten persons sue A?

13. Do you know any reason against the rule that the assignee of a contract takes it subject to defenses which can be made against the transferor?

CASE PROBLEMS
(Written or Oral)

No. 56

Blair rented his wagon to Rominger with an option to buy the wagon. After Rominger had used the wagon several months he left the country, selling his rights to Mrs. Hamilton for $20. Shortly after this Blair demanded the wagon from

Mrs. Hamilton. She offered to pay what was due under the original contract. Blair refused the offer and brought suit (action of replevin) to recover the wagon. Is he entitled to recover? (148 Ind. 32.)

No. 57

Simms leased a carriage to Ball for five years with the agreement that the former was to keep it in repairs during this time. Simms moved away. He arranged with Moor to take his place, imposing upon him the obligation of making repairs, etc. Must Ball accept this new arrangement? (109 Eng. Rep. Re. 1156.)

No. 58

Rowan owed a dentist $125 for professional service, and agreed to pay in sixty days. The dentist assigned the amount due him to Jensen on June 1. Having forgotten about this assignment, the dentist made a second assignment to Fredericks on July 1. Fredericks promptly notified Rowan of the assignment. Who is entitled to the $125. (17 Howard 612.)

No. 59

Roe entered into an agreement with Mellon to dig an oil well on Mellon's land. Roe assigned this contract to Allen, who had the well dug in a workmanlike manner. Mellon refused to pay for the work contending he had not contracted with Allen. Decision? (172 Pa. At. Rep. 442.)

No. 60

Dr. Skinner acted as physician for Stone for one year. The doctor was to receive $500 for this service. He assigned his claim for this money to Sharp. Stone was informed of the assignment but refused to pay the money to Sharp. Can Sharp recover judgment against Stone?

Chapter XI

HOW TO DRAW A WRITTEN CONTRACT

Keep in mind these questions when studying this chapter:

1. **In order to be enforceable, must all contracts be in writing?**
2. **When should an agreement be reduced to writing?**
3. **Is there a difference between formal and informal contracts?**
4. **Before the agreement is written, what should be understood?**
5. **What should be included in a written contract?**

§ 44. **In general.**—In most cases, ordinary agreements are not reduced to writing. Sales and purchases are usually paid for and immediately delivered. A clerk or stenographer may be employed by the week; a carpenter may be hired by the day; a guest may engage a room at a hotel; a farmer may buy a plow; and many other forms of business transactions may be performed without the formality of a written contract. Modern business could scarcely be conducted on any other basis.

§ 45. **Formal articles of agreement.**—While the law does not require contracts to be reduced to writing (except those expressly provided by statute), it is desirable and sensible to do so in business transactions of importance. That which is written does not change. Written contracts prevent disputes and arguments as to what was agreed upon; they prevent an opportunity for false swearing in case of litigation, or at least, conflicting testimony. In the event of the death of one of the parties, the written instrument can be used as evidence if necessary.

§ 46. **Writing a contract.**—The chief reason for writing out a contract is to make it easy to prove. Before a contract can be enforced by legal means, it must be proved. There is no reason why a business man should not be competent to prepare ordinary contracts incidental to his business. To do so, however, care must be exercised in expressing the intentions

of the parties in clear and precise language. To this end a few general suggestions are here given:

(1) *Legal phraseology.*—It is not necessary that the written instrument be set out in legal phraseology. Legal terms and technical language should be avoided. The writing may be in lead pencil; even the signature of the parties may be with the same instrument. Printed matter, when employed as evidencing the intention of the parties, will be equally good as if done with a pen.

(2) *Intentions.*—Before the agreement is reduced to writing, there should be a thorough understanding as to the intentions of the parties, the terms, and other conditions. After a contract is executed, if litigation should arise, expressions that are ambiguous will be construed against the one who wrote the document.

(3) *Execution.*—The agreement should be signed by both parties. In a few instances, witnesses are required. After the contract is reduced to writing and is signed, neither of the parties will be permitted to prove by oral testimony that the contract is different from what it purports to be. It is a rule of law that the terms of a written contract cannot be contradicted, enlarged, or varied by parol evidence. The final understanding is based on what is put in "black and white." This does not prevent making a new contract, or subsequently changing the old one by an oral agreement—if both parties are willing.

The foregoing rule does not exclude oral testimony to prove fraud, duress, undue influence, mistake, and the like.

A person who voluntarily signs a contract is presumed to have understood and agreed to its terms. He is bound by it whether he read it or not, provided he was not prevented by fraud from reading it.

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable persons

to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." (83 Fed. Rep. 437.)

(4) *Preliminaries.*—The contract may be set out in separate paragraphs. When so arranged, the first paragraph should ordinarily contain the date, the names of the parties, and their place of residence. If there is likely to be any question as to the identity of the parties, they may be introduced and designated as *party of the first part* and *party of the second part*, and they should afterwards be referred to by these titles. This tends to avoid confusion in distinguishing the two parties, especially if either party consists of several persons.

(5) *Subject-matter.*—The second, and additional paragraphs if required, should set forth in specific detail the particular things to be done, or not to be done. These specifications should be arranged in methodical order for convenient reference and to prevent ambiguity. The consideration for the performance of the agreement should be indicated. Any other information essential to a complete understanding should also be fully expressed.

(6) *Formal statements.*—The closing paragraph is a formal statement referring to the signatures of the parties to the contract, with their names written underneath. If the contract be witnessed, there should be a statement at the left of the names of the contracting parties: "Signed in the presence of," and the name of the subscribing witness placed beneath this phrase.

The party signing a contract usually writes his own name. Still, if another writes it for him, in his presence and at his request, this will be sufficient.

Duplicate, or carbon copies should be made and be signed by all the parties to the agreement so that each of them may have a copy. Pending the performance of some obligation, it may be required that the contract be placed in the hands of another. This is known as escrow. It is particularly desirable to retain duplicate copies of such agreements.

Illustration of a Formal Contract

CONTRACT.

This agreement, made and entered into on this the 10th day of May, 19__, by and between A. F. Cooper, of Alexandria, State of Virginia, party of the first part, and William Bell, of Reading, Pennsylvania, party of the second part:

WITNESSETH: That the said party of the first part, in consideration of two hundred tons of Lehigh coal, sold to him this day by the said party of the second part, and by him agreed to be delivered to the party of the first part, at Alexandria, free of all charges and expense whatsoever, on or before the first day of October next, shall pay to the party of the second part within thirty days after such delivery, the sum of one thousand dollars.

And the party of the second part, in consideration of the foregoing agreement of the party of the first part, promises and agrees to forward and deliver, on or before the first day of October next, at his own expense, the said two hundred tons of Lehigh coal, and hereby warrants the same to be in good order and condition for use, free from slate, stones and impurities.

In witness whereof the parties of the first and second parts have hereunto set their hands on this the date first above written.

A. F. Cooper
William Bell

§ 47. **Form of contract.**—A general form of an agreement is here given. It illustrates a common arrangement sufficient for many purposes:

This agreement made this.....day of.....

by and between.....of.....party of the first

part, and.....of.....party of the second part,

Witnesseth, that the said party of the second part, in consideration of the agreements hereinafter set out, agrees to and with the party of the first part, to (*Here may be inserted in full the subject-matter of the contract*). In consideration of which the party of first part agrees to pay to the party of the second part the sum of.....when the party of the second part shall have fully completed the things so agreed by him to be done.

(Signed by).....(Seal)

.....(Seal)

QUESTIONS FOR DISCUSSION
(Oral)

1. When is it necessary to prove a contract in court? Why is a written contract considered more valuable than an oral contract?

2. The name of which party is usually placed first in a written contract?

3. Why is it advisable to insert in a written contract a statement as to the consideration?

4. Instead of designating the parties to a contract as parties of first part, and parties of the second part, how may they be otherwise designated?

5. Why is it advisable to consult a lawyer before signing a contract rather than afterwards?

6. "Impossibility of performance is often no excuse for non-performance," and may result in an action for damages. How may such a contingency be avoided?

7. Why should such terms as "about," "fair," "proper," "reasonable," etc., be avoided in a contract?

8. While the law may not require a witness to a written contract, why is it desirable?

9. To what extent does the signing of a contract bind the party who signs it, if he is unable to read?

10. You have been requested by a friend to advise him as to the chief object in having a contract in writing. In a few words explain the main purpose.

CASE PROBLEMS
(Written or Oral)

No. 61

In an action by a grower against a Marketing Company for an accounting, the main issue was the interpretation of a clause in the contract providing for the payment of the commission. The contract was drawn by the Marketing Company. There was uncertainty in the language used. In whose favor will this uncertainty be construed? Why is such a law reasonable? (203 Pac. Rep. 831.)

No. 62

A contract was signed by Clay, and the Acme Typewriting Company, whereby the latter sold to Clay a typewriter unconditionally and for a stated price. At the time the agreement was made and signed, the Acme Typewriting Company orally promised Clay that if the machine proved unsatisfactory he might return it and "get his money back." He now seeks to return the machine. What are his rights in the matter?

EXERCISES IN DRAWING WRITTEN CONTRACTS

Prepare written contracts for any of the following exercises the teacher may assign. Follow the suggestions as to local names and current dates, unless otherwise directed.

Exercise 1

Draw a contract by which you agree to work as bookkeeper and accountant for F. G. Robbins, who conducts a general

merchandise store at 221 Main Street (your city), at $40 per week, with two weeks' vacation during the month of July. You are to have, in addition to your salary, ten per cent. discount on all goods bought for your personal use. The position being of a confidential nature, it is agreed that you are not to disclose any of the affairs of the business to anyone other than the proprietor. The books are to be kept posted to date, and a financial statement made at the close of each fiscal period.

Exercise 2

Write a letter to a prospective buyer, in such form as to constitute an offer to sell a used typewriter, giving the name of the machine, number, model, price, and terms. Use a local address and current date.

Exercise 3

Write an answer to the offer made in exercise 2, in such a manner as to constitute an acceptance. Do not vary or alter the terms, or other conditions, but suggest, if agreeable to the seller, certain changes you would like to have made.

Exercise 4

Read question number 7 in Questions for Discussion, Chapter 9, and write such a note to the grocer which will make the administrator personally responsible for the debt mentioned.

Exercise 5

Write the agreement discussed in Case Problem No. 38. Use current date, the name of your city, and other local conditions.

Exercise 6

Write the assignment referred to in Case Problem No. 59.

Chapter XII

TERMINATION OF CONTRACTS

Keep in mind these questions when studying this chapter:

1. **In what general ways may a contract be terminated?**
2. **How may a contract be terminated by agreement?**
3. **What are some of the incidents in respect to payment?**
4. **When does impossibility excuse performance?**

§ 48. **Ways of terminating a contract.**—There are various methods by which the rights and duties created by a contract may be terminated or discharged, among which are:

(1) Agreement of the parties.
(2) Performance.
(3) Impossibility.
(4) Bankruptcy.
(5) Breach.

(1) *Termination by agreement.*—The parties to a contract may provide for its termination by common consent, either at the time of the formation, or by a subsequent agreement. There may be an express provision that it will end upon the happening of a specified event, as the giving of two weeks' notice by either party, or as in the case of an insurance policy which stipulates that in case of increased risk the policy becomes void.

Robinson made a contract with the Mutual Life Insurance Company which provided that if the former should fail to write $10,000 worth of insurance during any three months the contract would terminate. Robinson failed to write the required amount during the required time, and the contract was thereby terminated without further notice.

The parties to a contract are free to make any changes they may choose, provided both parties are willing. They may agree to cancel the old contract entirely, or they may substitute a new agreement for an existing one.

Murphey contracted to build a house for Johnson according to certain plans and specifications, for which the latter was to pay $5,000 when it

was completed. By the time Murphey had excavated the cellar, Johnson decided to move out of the community and did not wish to have the house built. He offered Murphey $300 for the work already done, provided he would release him from his contract. Murphey accepted the proposition. This terminated the original contract.

(2) *Performance.*—The usual method of terminating a contract is by the performance of all its provisions by both parties. The contract is then executed. Either party is discharged from his obligation as soon as he has done all that he has agreed to do. But the discharge of one party does not release the other, if there is something remaining to be performed by him.

(a) *Payment.*—The payment of the amount actually agreed upon between the parties discharges the contract. The payment of the full amount due furnishes a complete performance. The contract may provide that payment is to be made in negotiable paper, or other personal property, or by a transfer of land. Money is the ordinary medium of payment. When the contract calls for payment in money, the one to whom it is due need not accept a check, note, or other property.

Accepting a check or note is merely a conditional discharge of the obligation contingent upon the payment of the check when presented at the bank, or of the note when due, unless there is an express agreement of the parties otherwise.

(b) *Tender.*—An offer to pay a sum of money in satisfaction of some claim is termed a *tender of payment.* Its acceptance is a payment, and discharges the one making it, but its refusal does not release the obligation. It merely releases the liability for costs and interest that may accrue after the tender was made. It will be observed that "chimney corner law" advising that the offer to pay cancels the debt, whether the other party accepts it or not is not so in reality.

The requirements of a valid tender are: (*i*) exact amount, (*ii*) without restriction, (*iii*) money in sight (*iv*) proper money, (*v*) continuing offer.

(*i*) *Exact amount.*—The full amount of the debt actually due must be tendered; anything less is of no effect. It need not necessarily be the exact sum, but may be an amount in

excess of the debt, if the creditor can take exactly what is due from the amount offered without being called upon to give change.

(*ii*) *Without restriction.*—The tender must be unconditional. If some condition is annexed, like requiring a receipt in full of account, or of all demands, or the like, the tender is not good. This does not prohibit a demand for the return of the instrument of indebtedness, or for a receipt for the actual amount paid.

(*iii*) *Money in sight.*—The money must be actually offered. It is not sufficient to express a willingness to pay, but the money must be produced and offered, unless the creditor waives its production or renders it impossible by his refusal to examine or accept it.

(*iv*) *Proper money.*—It must be in legal tender currency.[1] By this term is meant money that may be legally offered in payment of debts. If the tender be made in bank notes and no objection is offered, it will be sufficient.

Under the laws of Congress the following money is legal tender: Gold coins and silver dollars and gold and silver certificates of the United States, and United States notes (commonly called greenbacks), and demand treasury notes are legal tender to any amount. Silver coins of value less than one dollar are legal tender for an amount not exceeding ten dollars; other coins for any amount not exceeding twenty-five cents in any one payment.

National bank notes and Federal reserve notes are not legal tender but are a good tender unless objected to on the score that they are not legal tender.

(*v*) *Continuing offer.*—The tender must be kept alive. This means that if it be properly made and is rejected, the money must be kept in readiness for the creditor on his demand, even to bringing it into court for the use of the plaintiff, if suit is subsequently instituted.

(3) *Impossibility of performance.*—In a former topic it was shown that legal or physical impossibility existing at the

[1] *Definition of the term legal tender.*—Money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself.—BOUVIER'S LAW DICTIONARY.

time a contract is made, renders it unenforceable. (See § 33-3.) If one contracts to do a thing possible at the time, he must pay in damages to the other for his failure to do so, though his breach is the result of conditions arising later, which make it impossible for him to perform. In other words, unforeseen difficulties do not excuse an obligation.

Defendant agreed to build a house for the plaintiff by the 1st of May, and had it nearly completed, when on the 27th of April it was struck by lightning and destroyed. The defendant was held liable in damages for the non-performance of his contract. If he did not wish to be so held he should have provided for no liability under such circumstances.

The contract will be terminated if it has become impossible by events arising subsequently to its formation, as in the following cases: (*a*) destruction of subject matter, (*b*) changed laws, (*c*) death or disability, (*d*) act of the parties.

(a) *Destruction of subject-matter.*—Where the very nature of the performance is dependent upon the existence of some specific thing, its destruction terminates the contract.

Roe agreed to make a violin for Doe out of a particular piece of lumber, furnished by the latter for that purpose. Through no fault of Roe's a fire destroyed the lumber furnished. The contract was terminated, and Roe was not liable for damages.

(b) *Changed laws.*—A change in the laws of the country where the contract is to be performed will discharge the contract, if such change prevents the performance of the contract.

A tenant agreed to rebuild if the premises were destroyed by fire. A subsequent ordinance prevented the erection of wooden buildings in that district. His contract did not provide for any other kind of building, and he was therefore released from his contract.

(c) *Death or disability.*—If the contract is for the performance of personal service, the death or disability of the promisor will terminate the agreement.

Devoe agreed to paint Jackson's picture. Devoe's health failed, and he was unable to keep his agreement. His incapacity discharged the contract.

(d) *Act of the parties.*—If the party to whom the performance is due makes it impossible for the other to act, the latter will be released.

Sayles contracted to paint Braun's house within a certain period. Braun was doing the carpenter work on the building and failed to complete it—in fact, did not do any of it. This excused Sayles from any liability.

Termination of a contract by bankruptcy and breach will be discussed in the following chapter.

QUESTIONS FOR DISCUSSION
(Oral)

1. Sam Stewart gave Richard Row a note in payment for a suit of clothes. The note is now due and Stewart refuses to pay it. Did the acceptance of the note extinguish the debt?

2. Defendant Hibbard entered into a contract with plaintiff Summers to manufacture and deliver a certain quantity of sheet-iron which the plaintiff had contracted to sell. The defendant failed to deliver the sheet-iron, alleging that the breaking of machinery in his factory made it impossible for him to manufacture the agreed product. Would an accident to machinery be a justifiable excuse for the non-performance of the contract under the question of impossibility? If not why not? (153 Ill. 102.)

3. What is the justification of the rule requiring payment to be made in legal tender?

4. Sumner owed Winters a debt amounting to $750. Sumner offered in payment $500 in silver dollars, $150 in gold coin, $15 in silver half dollars, $10 in quarters, $25 in Mexican silver dollars, $10 in nickels, $10 in Federal reserve notes, $15 in National bank notes, $25 in silver certificates, and his personal check for the balance. Winters refused to accept on the ground that the offer was not a legal tender. Which of the foregoing amounts are legal tender?

5. (a) After a contract is once entered into, may both parties agree that it will no longer bind either of them?

   (b) What is the effect if both parties to a contract agree to substitute a new contract for an existing agreement?

6. Do you think unforeseen difficulties which render performance impossible should discharge a contract? Why?

7. If the offering of the money due on a debt does not discharge the obligation, what advantage accrues to the debtor by making a tender of payment?

8. The creditor absents himself from home and avoids the debtor at every turn, thus making it difficult for the debtor to pay the amount due. What effect does this have on the duty of the debtor to make a tender?

9. Jones agrees to sell his home to Casey on January 10. On that day Casey appears and demands the house. He has the exact amount of the purchase money in his pocket at the time. Has he made a valid tender?

10. Anderson tendered $18 in payment of his debt by offering to give the creditor a $20 gold piece. The creditor refused this offer. Why may he do so? (158 Mass. 339.)

11. Brown claims that White owes him $200. White insists that the amount is only $150. They finally compromise by agreeing on $175. Will the payment of the amount agreed upon discharge the indebtedness?

12. Under a contract for the sale of ten tons of coal, Weld tendered payment in cash. The coal dealer refused to accept the money. Is the debt discharged by this refusal?

13. Field sold goods to Hull which, according to the agreement, were to be delivered July 15. On this day Field tendered delivery of the goods. What is the effect of this tender of goods? (27 Am. Dec. 174.)

14. What are the requirements of a valid tender?

CASE PROBLEMS
(Written or Oral)

No. 63

Johnson agreed to paint Nash's house, for which Nash promised to pay $100. Neither party had acted when they mutually agreed to cancel the agreement. The agreement to

cancel is itself a contract and must possess all essential elements. Is there any consideration in a cancellation contract? What is it? (128 Mass. 116.)

No. 64

Joe Collins planted 100 trees in Samson's orchard, for which Collins was to receive $50. Being a good friend of Samson, Collins agreed to terminate the contract by releasing Samson from payment. Several months later Collins demanded that Samson pay the $50. Is he entitled to collect? (9 R. I. 90.)

No. 65

A contract of employment, running for one year, provided that the parties had a right to terminate the relationship of master and servant by giving thirty days' notice. Would such notice terminate the contract? (46 Pa. 426.)

No. 66

A contractor agreed to build a garage as specified for $800. The building was completed and acceptable except for a broken pane (12x16 inches) in one of the windows. The property owner refused to pay the contractor until he put in the pane of glass. Is he justified when there is a substantial performance? (7 Pick. [Mass.] 181.)

Chapter XIII

TERMINATION OF CONTRACTS—CONCLUDED

Keep in mind these questions when studying this chapter:

1. **Why are there bankruptcy laws?**
2. **How may one become a bankrupt?**
3. **What are the remedies for a breach of contract?**
4. **How are damages measured?**
5. **What is specific performance, and when enforced?**

(4) *Termination by bankruptcy.*—The term *bankruptcy* implies a failure or inability to pay just debts. The Constitution of the United States gives congress power to establish uniform laws on the subject of "bankruptcy" to be operative throughout the states. The design of these laws is to enable honest persons unable to pay their debts to be discharged from onerous burdens, and to equitably distribute their assets. This is done by a judicial proceeding in which the property of the bankrupt is applied to the payment of his creditors. An equitable distribution of the assets gives no unfair preference of one creditor over another, large or small, near or far distant. A valid discharge releases the bankrupt from present legal indebtedness. This does not prevent a revival of his obligations by making new promises to pay them.

Origin of Bankrupt Laws.—The English word *bankrupt* is derived from the Italian, *banca rotta*, meaning a broken bank or bench. The term first appeared in the laws of Henry VIII, A. D. 1542, and then only in the title of the act "An act against such persons as do make bankrupts." This was especially aimed at dishonest traders and not against unfortunate debtors, nor against traders in particular. While it provided for seizing their goods and dividing them among the creditors, it did not discharge or afford any relief to the debtor from his unpaid creditors. In 1694 the "Insolvent Debtors Act" was enacted whereby other persons than fraudulent traders might obtain relief from imprisonment (but not from debt) by surrendering their assets.

The bankruptcy system of the United States is now embodied in the National Bankruptcy Act, passed in July, 1898, and since amended several times. The last amendment was

approved May 27, 1927, and contains a number of important changes. There had been four bankrupt laws previously enacted by congress. It is said the reason the first one proved unpopular was because it followed too closely the English law. Each state has the power to pass similar laws when congress does not exercise the right. State statutes relating to the subject are generally called *insolvency laws*. Such legislation is inoperative when the federal statutes are in force.

(a) *Who may become bankrupts.*—(*i*) Any person, partnership, or corporation, except a municipal, railroad, insurance, or banking corporation, may become a voluntary bankrupt. The proceedings are said to be voluntary when they are instituted by the bankrupt himself.

(*ii*) Any natural person, except a wage-earner or farmer, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or more, may be adjudged an involuntary bankrupt. The proceedings are said to be involuntary when they are instituted upon the application of the bankrupt's creditors.

(b) *Acts of bankruptcy.*—The Bankruptcy Act enumerates certain acts, which, if committed by an insolvent debtor, renders him liable to be adjudged by a court an involuntary bankrupt. The most important of these acts are as follows:

(*i*) Conveying, transferring, or concealing property with the intent to hinder, or defraud creditors.

(*ii*) Transferring, while insolvent, property to a creditor for the purpose of giving that creditor preference over other creditors.

(*iii*) Giving or permitting preference, while insolvent, through legal proceedings to creditors over other creditors.

(*iv*) Permitting, while insolvent, any creditor to obtain through legal proceedings, any attachment, judgment, or other lien.

(*v*) Making an assignment of his property for the benefit of his creditors, or applying for a trustee or receiver of his property.

(*vi*) Admitting in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground.

(c) *Duties of bankrupts.*—The bankrupt shall (*i*) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (*ii*) comply with all lawful orders of the court, . . . and file with the petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to; . . . (*iii*) submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

(d) *Discharge in bankruptcy.*—Within twelve months after he is adjudged a bankrupt, the debtor may apply for a discharge from his debts. If he has obeyed the court's orders, and has not been guilty of any acts which would deny him a release, he will be discharged. This will permit the bankrupt to start anew. Any property he may afterwards acquire will not be liable for his former debts. However, there are certain debts that are not affected by a discharge in bankruptcy. The following are the principal debts which are not released by the discharge and which survive the bankruptcy:

(*i*) Taxes, levied by the United States, state, county, or municipality.

(*ii*) Liabilities for property obtained by false pretenses.

(*iii*) Liabilities for wilful and malicious injuries to persons or property of another.

(*iv*) Claims for alimony, the maintenance of wife and children, and breach of promise to marry.

(*v*) Claims not scheduled in time for proof and allowance, if known to the bankrupt, unless the creditor had notice of the proceedings in bankruptcy.

(*vi*) Liabilities created by fraud, or misappropriation while acting in a fiduciary capacity.

(*vii*) Wages due the lower grades of employees earned within three months of the bankruptcy.

(*viii*) Money of an employee deposited with an employer to secure the faithful performance of the employee during the terms of the contract.

(5) *Termination by breach.*—When one of the parties breaks a contract by failing or refusing to fulfill his obligations, the other party may be discharged from further performance.

To constitute sufficient grounds to terminate the contract, the breach must relate to a material provision; it must go to the very root of the matter. A mere failure to do something of minor consequence, collateral to the main contract, will not release the other party; he may recover damages for the breach, if injured. The law does not recognize trivial matters.

Plaintiff agreed to build a house for the defendant and have it completed by the first day of August. He did not get it done until the tenth day. This was a substantial performance, and the defendant was not discharged by the delay.

When a party to a contract positively repudiates his agreement, the other party has an immediate right to bring a suit for damages. But whether he brings a suit then or later, he has no right to increase the damages of the defaulting party by continuing performance after the receipt of such notice.

John Harper entered into an agreement to sell and deliver his motor-cycle to Charles Bryant, August 1. Receiving a better offer before date of delivery, Harper sold and delivered the motor-cycle to Richard O'Connor July 2. Bryant had a right to bring suit for damages as soon as Harper made the sale to O'Connor.

Thomas Tatum made a contract with John Jones to manufacture and construct a fence around the former's farm. When Jones had part of the fence made, Tatum rescinded the order. Jones would be entitled to recover his profit on the entire job, but he would not be permitted to increase Tatum's damages by performing the entire contract after getting the order to stop.

§ 49. **Remedies for breach of contract.**—When a contract is broken, the party who is injured by the breach may recover in money from the other for the damages he is deemed to have suffered. Damages may be defined as a pecuniary compensation recoverable for any injury. They are usually awarded as compensation and not as punishment.

(1) *Measure of damages.*—The injured party, as a general rule, is entitled to be placed in the same position, so far as money is concerned, as if the contract had been performed.

(a) If the breach results in a failure to pay money, the damages would be the amount of money due, with interest at the legal rate from the time it became due.

(b) When the seller of personal property holds the property for the purchaser, on account of the failure of the latter to accept, then the entire contract price will be the amount due. Or if the seller retains the property as his own, he can recover the difference between the market price and the contract price. If the seller elects to resell the property, he can recover the difference between the first selling price and the amount received.

(c) An employee, discharged before the end of the term of his employment, may recover the full amount of the wages he would have received from the time of his discharge until he secured other employment, within the contract period. But he must make a reasonable effort to secure other employment, and all money earned in other employment would go to reduce the damages to which he would otherwise be entitled.

(2) *Liquidated damages.*—The parties may fix upon an agreed amount at the time of entering into the contract, the compensation to be paid by either party, in case of a default. This is known as *liquidated damages.* If the amount is reasonable, the courts will enforce such stipulations. If the amount is unreasonable—out of all proportion to the actual damages—it will be regarded as a penalty, and the courts will not enforce it.

The Wallis Iron Works agreed to build and have completed a grandstand for a race course on or before a certain date or pay $100 for each day thereafter that it remained uncompleted. It was agreed that the

amount was to be paid as damages and not as a penalty. This grandstand was an extensive enterprise, costing $133,000 to build. The court held that the damages agreed upon in advance were not unconscionable. (55 N. J. L. 132.)

The defendant formerly owned a drug store in a city of 30,000 inhabitants. He had a good trade throughout the city. He sold the business to plaintiff and agreed not to engage in the same business in that place for a period of five years, and in the event of doing so the defendant agreed to pay the plaintiff the sum of $3,000. Before the expiration of the five years the defendant broke his agreement by engaging in the drug business in the same place. The plaintiff sued the defendant for damages but failed to show that he was actually damaged. It was not necessary that the plaintiff show that he was damaged to be entitled to recover the $3,000, the sum agreed upon in advance. If the defendant could have shown that the amount was in the form of a penalty rather than damages, that might have affected the contract.

(3) *Statute of limitations.*—The right to bring a suit for damages for a breach of contract is put to an end by lapse of time. If the party injured does not exercise his right within the prescribed time, the debt is said to be "outlawed," and he will be barred from his rights. This time is fixed by "statutes of limitation." If it were not for these statutes, a plaintiff might delay bringing his action until the defendant had lost the evidence on which his case rested. A dilatory claimant deserves no assistance. The debt may be kept alive or be revived by a part payment, by a payment of interest, or by a new promise to pay. Nearly all the states require the new promise to be in writing, but in some jurisdictions an oral promise is held to be sufficient. The period begins to run anew from the date of its revival.

Cott owed Cochrane a debt of $603.03 which was long past due and about to be barred by the Statute of Limitations. Upon a request for payment Cott wrote a letter in which he stated his inability to pay at that time and hinted at a hope of paying in the future. Cochrane construed the letter as sufficient acknowledgment of the debt to revive the obligation and take it out of the statute. The court held that a letter "stating that the debtor hoped to be able to make some money was too vague and uncertain to constitute an admission of an existing indebtedness." (138 S. W. 46.)

The following table shows the time allowed in the different states within which actions must be commenced. The time varies in the different states, and is subject to change by legislative enactment. In many cases judgments may be extended or renewed under statutory provisions. The numbers in the different columns refer to years.

State	Notes	Open Accts.	Judgments	State	Notes	Open Accts.	Judgments
Alabama	6	3	20	Montana	8	5	10
Arizona	6	3	4	Nebraska	5	4	5
Arkansas	5	3	10	Nevada	6	4	6
California	4	4	5	New Hampshire	6	6	20
Colorado	6	6	6	New Jersey	6	6	20
Connecticut	6	6	No limitation	New Mexico	6	4	7
				New York	6	6	20
Delaware	6	3	10	North Carolina	3	3	10
Dist. of Columbia	3	3	12	North Dakota	6	6	10
Florida	5	3	20	Ohio	15	6	21
Georgia	6	4	7	Oklahoma	5	3	5
Idaho	5	4	6	Oregon	6	6	10
Illinois	10	5	20	Pennsylvania	6	6	20
Indiana	10	6	10	Rhode Island	6	6	20
Iowa	10	5	20	South Carolina	6	6	10
Kansas	5	3	5	South Dakota	6	6	20
Kentucky	15	5	15	Tennessee	6	6	10
Louisiana	5	3	10	Texas	4	2	10
Maine	6	6	20	Utah	6	4	8
Maryland	3	3	12	Vermont	6	6	8
Massachusetts	6	6	20	Virginia	5	3	20
Michigan	6	6	10	Washington	6	3	6
Minnesota	6	6	10	West Virginia	5	3	10
Mississippi	6	3	7	Wisconsin	6	6	20
Missouri	10	5	10	Wyoming	10	8	10

(4) *Specific performance.*—If the damages to be recovered would be an inadequate remedy, special relief, termed *specific performance,* is sometimes granted the injured party. This is an order from an equity court requiring the party to carry out his contract, or in other words, decreeing specific performance of the agreement. In the case of personal property, damages are usually considered sufficient compensation. If the personal property consists of some patented article or rare work of art that cannot be obtained elsewhere, specific performance will be awarded. The rule is more generally applied to contracts for the sale of real property than it is to personal property.

Anderson desires to obtain 1,000 shares of stock in a certain corporation, for a particular purpose, and Brown agrees to sell him 10 shares, which are the last obtainable, and which will make up the desired number for Anderson. Upon Brown's refusal later to transfer the 10 shares, a court of equity will compel the transfer.

In order that a court may make the decree of specific performance, it is essential that:

(a) The contract be founded upon a consideration, and this consideration must be proved.

(b) The enforcement of the contract must be practicable.

(c) The enforcement of the contract must be actually necessary to the plaintiff, due to an inadequate remedy at law.

(d) If the contract must be in writing by the Statute of Frauds, it must comply with that requirement, if specific performance is sought.

QUESTIONS FOR DISCUSSION
(Oral)

1. Howell agreed to build a house for Fulton which was to be completed by December 1. A day before its completion an army of the enemy seized the city and totally destroyed the building. What is the effect of this invasion and resulting destruction in regard to excusing performance?

2. A farmer contracted to deliver two hundred bushels of potatoes to be raised on a particular piece of ground. The entire crop was destroyed by blight. Must the farmer pay damages for non-performance of contract?

3. Is there any good reason for exempting the wage earner and the farmer from the provisions in respect to involuntary bankruptcy?

4. Wood, who was employed for one year at a salary of $2,400, was wrongfully discharged by his employer at the end of the third month. Wood immediately found employment elsewhere at a reduced salary, earning only $125 a month. Can he recover from his former employer? If so, state how much?

5. Why are certain acts classed as acts of bankruptcy?

6. Mrs. Marrs prepared a foundation on her premises for a monument. She contracted with Wigent, the plaintiff, to erect a monument thereon. Before the monument was completed Mrs. Marrs ordered the work discontinued. Can Wigent

collect the contract price? Can he collect any part of it? (130 Mich. 609.)

7. Is it desirable to have a National bankruptcy act rather than to have similar laws in each state?

8. Myles entered into a written contract with Potter to paint the latter's house, and furnish the materials. Myles performed part of the contract but abandoned the work before it was completed. Potter did not consent to the abandonment, nor accept the unfinished work. Can Myles recover for the labor and materials? Give reason for your answer.

9. A is about to go into bankruptcy. A owes B $500. Immediately before filing his petition in bankruptcy he promises B he will pay the debt in spite of any discharge he may get in bankruptcy. Is this promise binding? Under what conditions might it be enforceable?

10. What is the difference between a voluntary and an involuntary bankrupt?

11. An artist who had contracted to give a recital for $1,000 suddenly became ill and was forced to cancel his engagement. This resulted in a disappointment to many persons and a money loss to the manager of the theater. What is the liability of the artist?

12. Day and Eaton entered into a contract for the sale of a forty-acre farm, for which Day agreed to pay Eaton $8,000. This was a good price for such land but Day was willing to pay it because this was an old homestead, the place of his birth. When Day tendered Eaton the amount agreed upon Eaton refused, saying that he would rather pay damages on the contract than sell the land. Can Eaton be compelled to deed the land to Day?

13. J entered into a written contract with D to paint the latter's house for $450. After part of it was painted, the house was destroyed by fire through no fault of D. Can J recover upon his contract? If so, to what extent?

14. What justification is there for enacting a statute of limitations?

15. Should an attorney advise his client to take advantage of such statutes if they apply to the client's debt?

CASE PROBLEMS
(Written or Oral)

No. 67

A corporation employed a number of men for periods specified in their contracts. The corporation was subsequently enjoined from doing business, and all employees were discharged. What is the corporation's liability with regard to these contracts of employment? (91 N. Y. 174.)

No. 68

A publisher engaged an author to write an article for his magazine. It was agreed that the writer should be paid when the article appeared in print. The publisher discontinued the periodical when the writer had partly completed his work. Is the author entitled to receive pay for the work done? (8 Bing. 14.)

No. 69

Freeman on January 1, contracts to execute a lease to Taylor on July 1. On June 15 Freeman executes a lease to Webb on the same property and the same terms. When may Taylor sue for the breach of the contract? (2 E. & Bl. 678.)

No. 70

Duncan has a contract to build a fence for Smith for which he is to receive $100. Before Duncan starts to build the fence, Smith changes his plans and decides he does not want the fence, and offers Duncan $5 in settlement. If Duncan accepts the money, is the contract discharged? If Duncan refuses the $5 can he still proceed to build the fence and collect the original contract price? How much can he collect?

No. 71

Defendant owes plaintiff three debts of $300 each. All of these debts are barred by the Statute of Limitations. Defendant writes a letter to plaintiff in which he says, "I owe you three debts of $300 each. I promise to pay you one of those $300 debts which I owe; the other two I shall not pay." To what extent is defendant's promise in writing binding?

Chapter XIV

NEGOTIABLE INSTRUMENTS

Keep in mind these questions when studying this chapter:

1. **How did the use of negotiable instruments originate?**
2. **What is the chief function of a negotiable instrument?**
3. **Is there a material difference between assignability and negotiability?**
4. **Do the elements of contracts in general apply to negotiable instruments?**
5. **How may one become a holder in due course?**

§ 50. **Nature and development.**—Among savages, and very primitive people, money was unknown. Each family was, to a large extent, sufficient unto itself, with little need for barter or trade. They supplied their individual wants the best they could under the circumstances. As civilization progressed it was found that the individual wants of families increased faster than their needs could be supplied. Consequently, the exchange of property for other property was resorted to in a limited way. With advancing progress, these exchanges among the different families of a community increased and became more frequent—and more involved. In an attempt to obviate some of the difficulties and inconveniences incident to barter, the next step forward was the adoption of some article to represent and serve as a medium of trade, and thus facilitate making exchanges. For this purpose many different articles at times served as money.

As people became organized into social units or groups with some form of established government, and business intercourse developed, bills of exchange, the earliest form of negotiable instruments, were adopted to avoid sending money out of the country.

Negotiable instruments were anciently made use of in a limited way by the Athenians, brought to a high degree of perfection in Italy, later introduced into England, and from there came to this country with the adoption of the common

law. They owe their origin to the customs and usages of merchants and traders. It was once thought that none but merchants could be parties to contracts of this kind, but this opinion long since became obsolete.

(1) *Credit money.*—In time, bills of exchange and other forms of negotiable instruments became accepted as substitutes for money. Such paper in itself has no inherent value. It is dependent upon faith for its worth, and is known as credit money. As trade grew, and became more extended and intricate, it was found possible to further improve and increase the exchange of property by means of transferable evidence of credit.

Negotiable instruments, also called "negotiable paper" or "commercial paper" is a term applied collectively to written contract obligations, of a certain kind, used in commercial transactions. They possess the peculiarity of negotiability, which causes them to circulate freely, and which makes them so valuable in the business world. Their chief function is to take the place of money. To this end they are so favored in law that, if properly executed and certain rules are adhered to, they may pass from hand to hand like the currency of the country and far more conveniently than actual cash. Before maturity, the genuineness of the instrument and the solvency of the parties are alone to be considered in determining their value. They have been truly termed "a courier without luggage."

(2) *Parties to instrument.*—The parties to a negotiable instrument may be divided into (a) original, or those who are named in the instrument, and (b) subsequent, or those into whose hands it may fall later.

The competency of these parties does not differ from the competency of parties to any contract. The original parties must be designated with certainty, so that he who is to pay may know to whom payment should be made; also that he who is entitled to receive payments may know from whom to demand it. The original parties must be the particular parties mentioned in the instrument.

§ 51. **Negotiable Instruments Law.**—Within recent years, forty-eight states and territories have adopted, by statutory

enactment, what is known as the Negotiable Instruments Law. This act was prepared under the direction of a Commission on Uniform State Laws, and is designed to make the laws pertaining to negotiable instruments uniform throughout the different states. The attempt has been to make the law not only uniform, but also to state it in simple and clear terms. The essential provisions of the Negotiable Instruments Law have been incorporated, so far as practicable, in the following treatment of the subject.

§ 52. **Assignability.**—Assignability pertains to transferring contracts in general. As a rule, contract rights, except those for personal service, may be assigned by one person to another. When so transferred, the purchaser, or assignee, acquires merely the rights therein of his immediate predecessor, subject to all the defenses the debtor holds against the assignor. (See §§ 37 and 38.)

Winters secured a contract from the Acme Knitting Company for a number of knitting machines, which contract Winters later assigned to Richard Roe, for a valuable consideration. Winters made material misrepresentations in securing the order, but the company did not learn this until after the contract had been assigned. Richard Roe will be unable to enforce the contract, due to the misrepresentations made by Winters.

§ 53. **Negotiability.**—Negotiability is a term applied to contracts of a particular kind which are capable of being assigned so that, under certain conditions and limitations, the transferee acquires a greater right than possessed by the one who conveyed the instrument. This characteristic is most important in connection with contracts which contain a promise to pay money, but other instruments such as bills of lading and warehouse receipts may be negotiable. The obligation in these cases is "to bearer" or "to the order" of a certain person, firm, or corporation. The subsequent holder may get a perfect title to the paper, while the transferer's title may have been imperfect. Hence, the transferring of a negotiable instrument is an exception to the general rule that the seller can give no better title than he possesses.

If a negotiable instrument is payable to bearer, it will pass title by delivery; and if it is lost or stolen, the person taking it in good faith from the thief or finder, for value and without knowledge of theft or loss, will be entitled to retain it against

the true owner. The holder of such a negotiable instrument may enforce its payment in his own name.

White gave Black a negotiable promissory note for $100, payable in sixty days. After giving the note, White discovered that through a series of business dealings Black really owed him $500. White may, at the end of sixty days, refuse to pay Black the amount due on the note, but instead may demand $400 from Black. Suppose, however, that Black had meanwhile sold the note to Green, who knew nothing of Black's indebtedness to White. White will not be permitted to set off Black's debt, but will be obliged to pay Green the amount of the note, and look to Black for the money due from him.

§ 54. **Holder in due course.**—In order that the holder may be entitled to the full benefit of negotiability he must be a "holder in due course," a term employed in the Negotiable Instruments Law as a substitute for the more involved term, "bona fide holder for value without notice before due," previously used. A holder in due course is one who takes the instrument under the following conditions:

(1) *That the instrument is complete and regular upon its face.*

One who takes an instrument showing alterations is not a holder in due course. Likewise, one who takes a note payable "On or before ..... after date" with the blank unfilled is not a holder in due course.

Thompson purchased a note that was apparently complete and regular. It was signed by the treasurer of the Davis Sewing Machine Company. It was not signed by the President in the blank space provided for that purpose. This printed title indicated that the president was the duly authorized official to sign notes of the company. It was held this instrument was not complete and regular. (105 N. Y. 59.)

(2) *That the instrument must not be overdue.*

The face of the instrument conveys the information whether it is past due or not. If it is payable at a fixed time, its due date is certain; if payable on demand, it is due a reasonable time after issued. A transfer on the date of maturity is not considered a transfer when past due.

A note past due raises a suspicion that should put the purchaser on his guard; and if transferred after maturity, the purchaser will take it subject to existing claims.

Black made a note in favor of White, or order, payable May 1. The note was not paid when due. Some time later the maker paid White

the amount of the note, but neglected to get the note as a receipt. Soon thereafter White transferred the note to Green for a valuable consideration and without notice of the previous payment. It was held that Green should not be entitled to recover from Black. (3 Term. Rep. 80.)

(3) *That he took it in good faith and for value.*

Good faith is absence of knowledge on the part of the purchaser of the facts which constitute the defense of the instrument. When he has notice of defects, he is a purchaser in bad faith. Where the holder offers to accept for a negotiable instrument a sum so small that a reasonable interpretation would be that there is something wrong with it, the courts will treat it as bad faith in the absence of inquiry on the part of the purchaser.

Where a promissory note for $300 was purchased for $5, and the maker was in fair credit and able to pay his obligations, it was held that the element of good faith necessary to a holder in due course was lacking. (22 Wis. 451.)

Value means any legal consideration sufficient to support a simple contract. Examples are the payment of money, the surrender of property, a promise to pay money.

(4) *That at the time the instrument was negotiated (transferred), the holder had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.*

Notice means any information that a prudent person would gather from looking at the instrument, or that might have come through any other source.

The title of a person who negotiates an instrument is defective when he obtains the instrument, or any signature thereto, by fraud, force, duress, or other unlawful means; or for an illegal consideration; or when he negotiates it in breach of faith, or under circumstances amounting to fraud.

Hill, by means of duress, procures a negotiable contract from Dale. This instrument was purchased by Mount who had knowledge of the method by which Hill obtained it. Mount cannot enforce this contract against Dale.

QUESTIONS FOR DISCUSSION
(Oral)

1. What is the purpose of negotiable instruments?

2. How do the rights of an assignee differ from the right of an indorsee?

3. A gave B a note for $200 for a used automobile, warranted to be in first-class mechanical condition. B passed the note to C who presents it to A for payment. A deducts $50 and offers to pay $150 because the automobile was not as represented. How much is C entitled to collect?

4. How do you account for the fact that the transferee of negotiable instruments has greater rights than the transferee of other kinds of personal property?

5. Enright, in good faith and for value, becomes the holder of a note in which the space reserved for the amount was left blank. It is revealed that the original deal was surrounded with much suspicion. At what disadvantage does Enright find himself?

6. Why is one who takes an instrument after maturity not considered a holder in due course?

7. John Doe, the payee of a note, obtained the instrument from the maker through fraud. Richard Roe (a party line subscriber) listened in on a telephone conversation about the circumstances surrounding the transaction. One week later Roe took this note from Doe in a business deal. Can Roe collect from the maker?

8. John Hendricks accepts a negotiable instrument from a stranger in payment for some goods. Does the fact that he accepted the instrument from a stranger preclude him from being a holder in due course on grounds of lack of good faith?

9. Does the fact that Hendricks made a profit on the goods affect the question?

10.

January 15, 1927.

I promise to pay to the order of Clay C. Duggan One hundred dollars. *H. R. Roen.*

Duggan indorses and hands this note to you July 15, 1927. Are you a holder in due course? Why?

11. You are delegated to carry $10,000 to a convention. Would you prefer to carry it in the form of currency or a negotiable instrument? Why?

12. An apple buyer issues a check to Thomas Smart for ten barrels of apples which turned out to be different than represented. When Smart presented the check at the bank he was informed that the apple buyer had stopped payment. What are Smart's rights against the maker of the check?

13. Same facts as above except that Smart gave the check to Peter Sterling who took it in good faith and for value. What are Sterling's rights if payment has been stopped?

14. A lawyer told his client that it is possible to obtain good title to a note negotiated by a thief. Acting on this information the client makes bold to take a note from a thief, which his friends refused. How would you have advised the client? (41 Ill. 483.)

15. You are offered a note which has written across the face in red ink, "This note is not negotiable." Would such a note be "regular upon its face" and would you be a holder in due course? (20 Ill. App. 238.)

16. Wm. Doner, a carpenter, owes a dentist $80 for professional services. The dentist assigned this account receivable to Richard Roe. Doner has a claim of $20 against the dentist for labor and materials. How much is Roe entitled to collect on the assigned account?

CASE PROBLEMS

(Written or Oral)

No. 72

Daniel Deronda was the holder in due course of two promissory notes for $100 each. After purchasing the notes, he

ascertained they had been obtained by the payee without consideration. Deronda then sold the notes to Adam Bede for $150, who was fully informed of all the facts. Is the maker of the notes liable to Adam Bede? If so, for how much? (25 Mich. 515.)

No. 73

A holder in due course attempted to sell a note in a community where everyone is informed about the shady dealings of the payee, who through deception, obtained the note from the maker. Ben Franklin took the note from the holder in due course with full knowledge of the deal. Is he a holder in due course? (25 Mich. 515.)

No. 74

Plaintiff bought a note for $1,000 from the payee for $500. The maker lived in Alaska, where the note was payable. Is the plaintiff a holder in due course? (93 U. S. 92.)

No. 75

McNamara bought a note from Dickens. The note was made by a man named Howe, who claimed it was obtained from him fraudulently by Dickens. McNamara was a holder in due course. Is he entitled to collect the note when due? (28 Wash. 461.)

No. 76

Miller bought a note from Chase, giving in payment some cash and the balance in a check. Before the check was cashed, Miller was told by Chase that the latter had obtained the note from Meyers by fraud. Is Miller a holder in due course? (46 Utah, 257.)

Chapter XV

BILLS OF EXCHANGE

Keep in mind these questions when studying this chapter:

1. **In what respect are bills, notes, and checks similar?**
2. **In what respect do bills, checks, and notes differ?**
3. **In what way does a draft differ from a trade acceptance?**
4. **What is the special value of a trade acceptance?**
5. **What is the contract of the drawer and the acceptor of a draft?**

§ 55. **Kinds of negotiable instruments.**—The most common forms of commercial paper in use today in business transactions are:

(1) Bills of exchange.
(2) Promissory notes.
(3) Bank checks.

(1) *Bill of exchange defined.*—A bill of exchange is an unconditional written order by one person to another for the payment of a sum certain in money to a third person or order, or to bearer, on demand or at a fixed or determinable time.

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, and requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to order or bearer. (N. I. L.)[1]

A bill of exchange is an unconditional written order by one person to another, directing him to pay a third person, or his order, or the bearer a sum of money therein named. (Tiedemann.)

Among business men, a bill of exchange is usually called a draft, although the latter term is more specifically applied to domestic bills. A bill of exchange is also known as a "bill," and when it is accepted, it is termed an "acceptance."

[1] Uniform Negotiable Instruments Act.

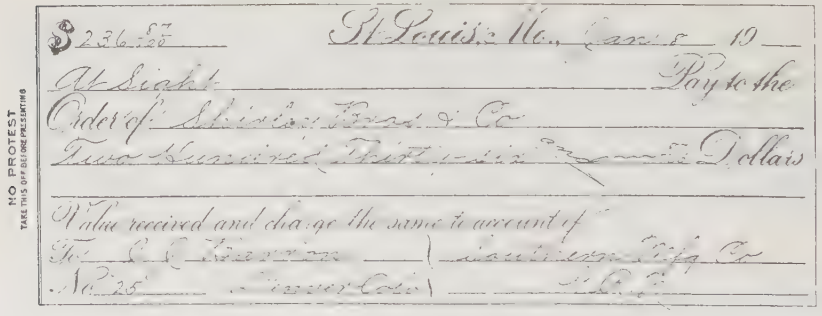
§ 56. **Foreign and inland bills.**—Bills of exchange are technically classified as foreign bills and inland bills. Bills drawn and payable in any other country or state are foreign bills. In this respect the states are considered foreign to each other. An inland bill is one both drawn and payable in the same state. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. This distinction is important if the bill is dishonored, and will be considered further under the subject of protest.

§ 57. **Form.**—A negotiable bill of exchange must have the formal requisites to be stated later, but no particular form of language is required other than to disclose the intention of the parties. The following was held to be a negotiable instrument:

"Mr. William Tebo will please pay to R. J. Torpey, or order, two hundred and fifty dollars, and charge to my account. Due October 1. John Ryan." (184 Mass. 307.)

It will be noted that a draft must be an order in writing; it must not be a mere request. "Please let the bearer have one hundred dollars, and you will oblige me" is much too polite, although a certain amount of politeness is permissible if it also includes an order. "Mr. B—— will much oblige Mr. C—— by paying to the order of Mr. A——." is a valid bill because it contains an order to pay Mr. A——.

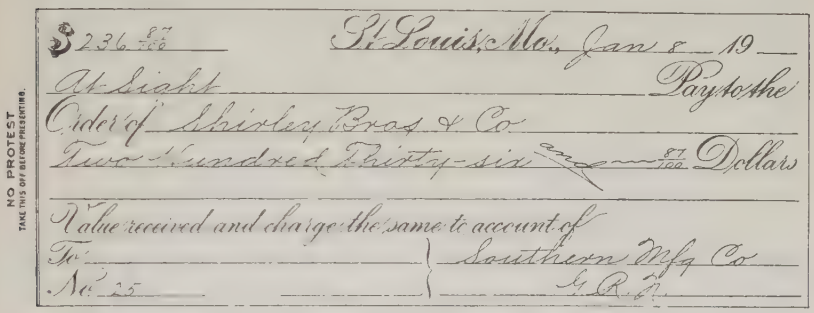
The following is the common form of a bill of exchange:



§ 58. **Parties.**—There are three original parties to a bill of exchange: (1) the one signing the bill, called the drawer; (2) the one who is ordered to pay the money, called the

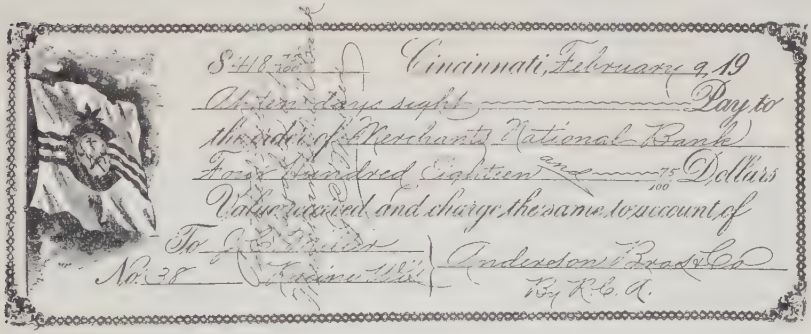
drawee, who is also the acceptor when he assents to the terms of the order; and (3) the one to whom the money is to be paid, called the payee.

If the first draft illustrated on the preceding page omitted the name of the drawee, as in the second illustration, it would be a non-negotiable instrument since the drawee must be named, or otherwise indicated with reasonable certainty.



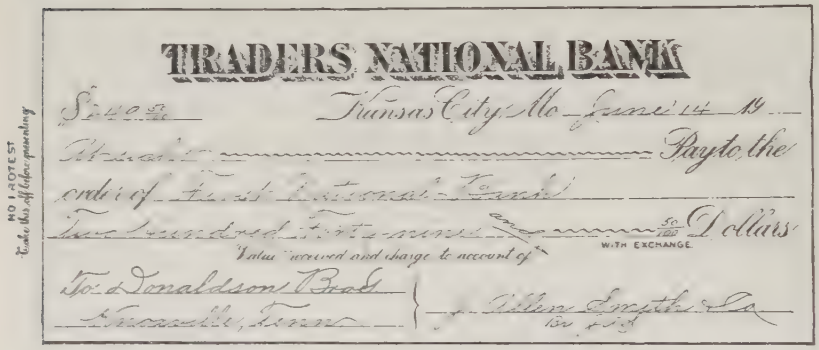
§ 59. **Time and sight drafts.**—A time draft indicates that the debt is not yet due the drawer, or that he wishes to allow the drawee additional time in which to make payment. They are usually written a certain time "after sight" and are known as sight drafts; or "after date" as time drafts. To fix the date of maturity, a draft payable after sight must be presented for acceptance.

The following is the form of an accepted time draft:



A sight draft is one made payable at sight or whenever presented. It indicates that the amount is either due or past due, and the drawer wishes it paid at once.

The following is the form of a draft payable at sight:



TRADERS NATIONAL BANK

$ 240.00 Kansas City, Mo. June 14 19..

At sight Pay to the

order of First National Bank

Two hundred forty and no/100 Dollars

WITH EXCHANGE

Value received and charge to account of

To Donaldson Bros

Knoxville, Tenn.

Allen Smyth & Co.

NO PROTEST

Take this off before presenting

§ 60. **Trade acceptance.**—As defined by the Federal Trade Board, a trade acceptance is "A bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by such purchaser." The principal difference between a time draft and a trade acceptance is that the former is drawn and accepted at the expiration of the term of credit (that is for an existing debt) with the purpose of granting an extension of time. A trade acceptance is drawn and accepted at the time of the sale, or soon thereafter, and must contain the following clause: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer." A draft is ordinarily used to collect an account that is past due, while a trade acceptance shows on its face the purpose for which it was drawn.

TRADE ACCEPTANCE

No. 101 Cleveland, Ohio, March 4, 19..

To Brown Store Company Peoria, Illinois

On June 2, 1923 (DATE OF MATURITY) Pay to the order of Ourselves

Five hundred and no/100 Dollars, ($ 500.00)

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The acceptance may be paid at any bank, banker or trust company in the United States which he may designate.

Accepted at ..... 19..

Payable at Pioneer Trust Company Bank

By Smith, McCord & Company

By A. M. Smith, Treasurer

Smith, McCord & Company, Cleveland, Ohio, sold to the Brown Store Company, Peoria, Illinois, groceries worth $500 on ninety days' credit. They shipped the goods by freight, and, with the invoice for the goods, they sent a trade acceptance in the form illustrated above. The buyer, the Brown Store Company wrote their acceptance across the face of the instrument and returned it to the seller. The trade acceptance thus becomes an acknowledgment of the receipt of the goods, and also a written promise to pay for them upon a specified date. Smith, McCord & Company may, if they desire, indorse and discount the acceptance and have the use of their money.

Thus it will be seen that the purpose of a trade acceptance is (1) to provide better evidence of the debt resulting from a credit sale than an open book account; (2) to provide commercial paper that may be discounted by the holder if desired; and (3) to encourage prompt payment on the part of the purchaser of goods.

§ 61. **Original use of bills of exchange.**—Bills of exchange were originally used as a substitute for money to be sent to a distant place. Adams, in Chicago, owes Brown, in Louisville, a debt of $500. Carter, of Louisville, owes Adams, of Chicago, an equal amount. Adams draws on Carter, asking him to pay the amount he owes Adams to Brown and sends the draft to Brown. Brown presents it to Carter, who pays the debt and retains the draft as a receipt.

§ 62. **Present use of drafts.**—Drafts are now used principally as a collecting medium, some bank or collection agency being, in nearly all cases, the payee. Ordinarily Adams would send his check to Brown, and expect Carter to pay his debt in the same manner. In case Carter did not do so, he (Adams) would draw a draft on Carter in favor of some bank, either in Louisville or Chicago, and send it to the bank to collect. If Adams did not pay his debt by check, Brown would draw on him in favor of some bank for collection.

§ 63. **Contract of acceptor.**—A draft drawn on the drawee is not binding upon him until he accepts it. If the drawee is willing to pay, he writes across the face "accepted," the date, and his name. A draft when presented for acceptance, must be accepted or returned to the drawee. If it is not returned within twenty-four hours it will be deemed to be accepted. The drawee is not obliged to accept unless he chooses, but once having accepted it, he is bound under the same obligation as the maker of a promissory note. He also acknowledges the

genuineness of the drawer's signature, and the capacity and authority of the latter to draw the instrument for the amount stated.

§ 64. **Contract of drawer.**—The obligation of the drawer is quite different from that of the maker of a note or the acceptor of a bill. The latter is absolutely and unconditionally bound to pay the instrument at maturity. The liability of the drawer is conditional upon (1) the proper presentment of the bill for acceptance when necessary, and for payment, and (2) due notice of dishonor. The drawer also warrants (a) that there is a drawee in existence, (b) that he is capable of accepting the instrument, and (c) that he will accept and pay it.

§ 65. **Presentment for acceptance.**—When a bill of exchange is payable after sight, it must be presented to the drawee for acceptance, for the purpose of fixing the date of maturity. If it is payable on a certain date, it need not be presented for acceptance, but the holder may, if he wishes, present it for acceptance before maturity for the purpose of ascertaining whether the drawee intends to pay it when due.

According to the Negotiable Instruments Law, presentment for acceptance must be made:

(1) Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary, in order to fix the maturity of the instrument;

(2) Where the bill expressly stipulates that it shall be presented for acceptance;

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

When presentment for acceptance is necessary, it must be made within a reasonable time after the instrument is required to be presented. Presentment must be made (1) by the holder (2) at a reasonable hour of a business day (3) to the drawee or acceptor (4) at his place of business, and if he has no place of business, then at his residence, unless the place is otherwise specified in the instrument. Failure to present the instrument properly for acceptance will discharge the drawer and indorsers from liability.

§ 66. **Notice of dishonor.** — After presentment has been made, if the drawee refuses to accept or pay the bill, it is said to be "dishonored." In such a case, notice must at once be given to the drawer and indorser; otherwise they are discharged. This is for the purpose of giving the drawer and indorser an opportunity to take prompt measure to protect themselves. Furthermore, such dishonor gives the holder an immediate right of recourse against the indorsers and drawer, and he may sue them at once, although the bill is not yet due. If the drawee accepts a time draft when presented, the holder must also present it for payment when due, and if not paid it is likewise "dishonored." Proper notice of dishonor must be given to the drawer and indorsers, if any, otherwise they will be discharged from liability.

QUESTIONS FOR DISCUSSION
(Oral)

1. Classify these instruments:

   (a) "I promise to pay to the order of William Smith Ten Dollars. Richard Roe."

   (b) "Pay to W. E. Carr or order Twenty-five dollars. To the First State Bank.
   James Doe."

   (c) "Pay to the order of J. Greene, One thousand dollars and charge the same to the account of
   To A. B. Marrs,
   Kitson, Mass. J. E. Hills."

2. A draft dated March 1, 1928, payable "at thirty days sight" was accepted a week after it was written. What is the date of maturity?

3. The payee presents a draft to the drawee for acceptance. The drawee responds with a shrugging of the shoulders, but says nothing. What are the payee's rights against the drawee?

4. Mills owes Nelson $600 on account. He hands Nelson a

draft for this amount on Orr. The latter writes the following acceptance across the face of the paper: "Accepted as to $400 of this amount. W. H. Orr." What would you do if you were in Nelson's position?

5. A draft held by Jones was presented to Doe, who accepted and paid it. Information reached Doe later that the drawee's signature had been forged. Can Doe recover from Jones? (46 N. Y. 77.)

6. Adam Bede owes your business $250 on account. This account is overdue, but Bede promises to pay in fifteen days. Your employer asks you to send a bill of exchange. What form will you use? Prepare such a bill.

7. "Our experience with a customer proves him to be tardy in his payments, and a quibbler about his accounts. His patronage is worth while and we want to keep him as a customer. Suggest a diplomatic procedure for the next sale."

8. You have received a draft from the drawer for the payment of an obligation he owes you. When you get ready to present the instrument for acceptance you find that the drawee is a fictitious person. What recourse have you?

9. An instrument payable "at thirty days sight" should be presented for acceptance promptly.

An instrument reading "On July 28 pay to the order of" need not be presented for acceptance until the day it is due.

Why do these requirements vary?

10. A sight draft was not presented for payment until nearly three years after its making by the drawer. The drawee now refuses to pay. Result? (26 Texas 472.)

CASE PROBLEMS
(Written or Oral)

No. 77

A bill of exchange is drawn and dated in Philadelphia, payable in London. This bill was actually delivered by the drawer in London and is now in the hands of a "bona fide

holder." Will he treat it as a foreign or inland bill? (23 Pa. St. 137.)

No. 78

A bill was directed to a partnership (A. B. & Co.) and was accepted by one partner in his own name. Is the partnership or the individual partner bound? (8 Minn. 407.)

No. 79

The drawee wrote the following note on a bill of exchange which was presented to him for acceptance: "Seen. March 19, 1927. (Signed) James B. Roe." Does this amount to an acceptance? (2 Hill [N. Y.] 582.)

No. 80

Black refused to accept a draft drawn on him by White. What must the holder do in order to collect from the drawer.

No. 81

Claflin draws a draft on Peterson. Peterson writes his signature and date across the face of the instrument. Is this sufficient to constitute a valid acceptance?

No. 82

In what respect is the following instrument unsatisfactory;

$211.24 Aurora, N. Y., June, 1927.

Pay to the order of Peter Sterling or bearer, $211.42 when his account is satisfactorily settled at my store.

W. H. Roe.

Chapter XVI

PROMISSORY NOTES

Keep in mind these questions when studying this chapter:

1. **What are the essentials of a negotiable promissory note?**
2. **Why are written promises preferable to oral agreements?**
3. **Wherein is a bond similar to a promissory note?**
4. **In what respect does a bond differ from a promissory note?**
5. **How is the maker of a negotiable instrument discharged from his liability?**

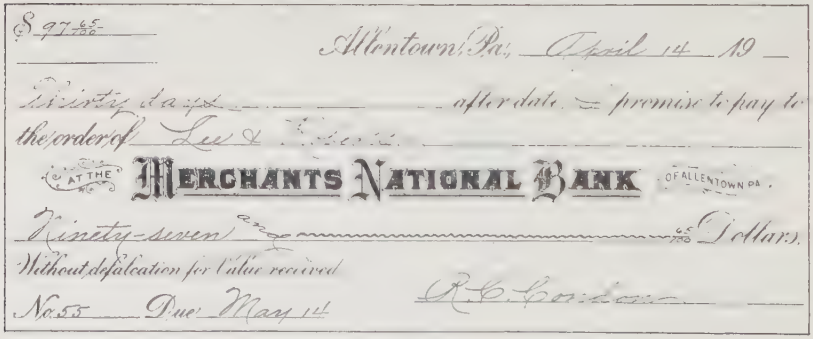
§ 67. **Definition.**—A negotiable promissory note is an unconditional promise in writing to pay a sum certain in money at a stated or ascertainable time to a designated person or order, or to bearer.

A negotiable promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable time, a sum certain in money to order or to bearer. (N. I. L.)

Promissory notes are frequently called for convenience "notes." They are also known as "notes of hand."

§ 68. **Parties.**—A note has two original parties: (1) the one who signs the note (the party who promises to pay), called the maker; and (2) the one who is to receive the money (the person in whose favor the promise is made), called the payee.

The following is the form of an ordinary promissory note:


$ 97 65/100
Allentown, Pa., April 14 19
Ninety days after date I promise to pay to
the order of Lee & Co.
AT THE MERCHANTS NATIONAL BANK OF ALLENTOWN, PA.
Ninety-seven 65/100 Dollars,
Without defalcation for value received
No. 55 Due May 14
R. C. Gordon

§ 69. **Essentials.**—The requisites of a negotiable promissory note are:

(1) It must be in writing and signed by the maker.

(2) It must contain an unconditional promise to pay a sum certain in money.

(3) It must be payable on demand or at a fixed or determinable future time.

(4) It must be payable to order or to bearer.

An oral promise to pay money might be a good contract, but it would not be a promissory note. A written agreement which expresses an intention on the part of the maker to pay another a certain sum of money at a stated time, might be an enforceable contract, but it would not be a negotiable note unless it complied with the foregoing conditions.

§ 70. **The maker's contract.**—The maker of a negotiable promissory note agrees that he will pay it according to its terms, admits the existence of the payee, and warrants his capacity to indorse. When a note is given it shows on its face the maker's promise.

The maker is discharged from his liability by payment of the instrument, by the intentional cancellation by the holder, by the lapse of the statutory period of limitation, or by bankruptcy.

§ 71. **Duebill.**—A duebill is an acknowledgment of an indebtedness, with no express terms in regard to the time or manner of payment. It is generally a simple memorandum stating an account and to whom due, and signed by the debtor, as, for instance:

Toledo, Ohio, Jan. 7, 19—

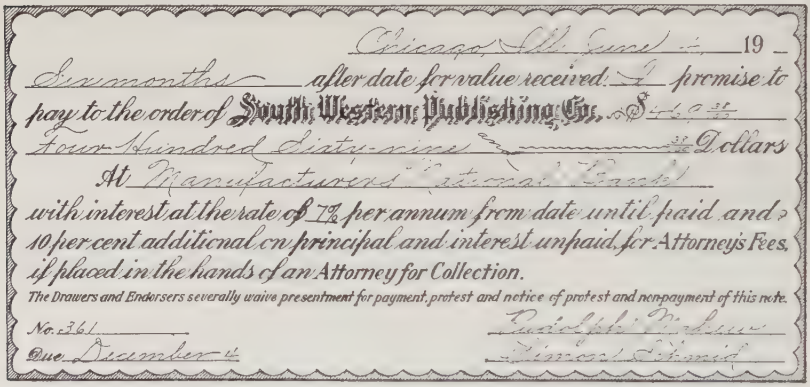
Due John J. Jones
One Hundred no/100 Dollars

Richard R. Roe

The three letters, "I. O. U." or similar words duly signed, is not a promissory note. While such a writing "contains a confession in the shape of an acknowledgment of a debt it

does not contain a repentance in the shape of a promise to pay."

§ 72. **Joint and several note.**—A joint and several note expresses that the makers jointly and severally promise to pay. They are individually and collectively liable for the payment of the note. The holder may collect the full amount from either signer without proceeding against the other, if he so chooses. The makers are liable jointly, that is, together, or they may be liable severally, that is, separately. Each of them has assumed full liability for paying the whole amount. Such a note may begin, "We, or either of us, promise," or "We jointly and severally promise." A note beginning "I promise" and signed by two makers is a joint and several note.


Chicago, Ill. June 4, 19 _
Six months after date for value received, I promise to
pay to the order of South Western Publishing Co. $469.35
Four Hundred Sixty-nine 35/100 Dollars
At Manufacturers National Bank
with interest at the rate of 7% per annum from date until paid and
10 per cent additional on principal and interest unpaid for Attorney's Fees,
if placed in the hands of an Attorney for Collection.
The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.
No. 361 Rudolph Mahn
Due Dec. 4 Simon Schmid

§ 73. **Bonds.**—Bonds are contract obligations, more formal than promissory notes, on the part of a corporation, a municipality, or a government, to pay money. If they are in the proper form, they are negotiable. Bonds are usually issued as either:

(1) Registered bonds.
(2) Coupon bonds.

(1) *Registered bonds* are registered to guard against their loss or destruction. This is accomplished by recording the names of the owners in the books of the corporation or government. A bond is transferred to another by the indorsement upon the back by the owner and the recording of the name

Typical Form of a Corporation Bond

UNITED STATES OF AMERICA

No. $500.

STATE OF OHIO

COUNTY OF HAMILTON

FOUR AND THREE QUARTERS PER CENT.

ROAD IMPROVEMENT BOND

CINCINNATI LOUISVILLE ROAD, ALSO KNOWN AS INTERCOUNTY HIGHWAY No 38, SECTION D

COUNTY'S PORTION

Know all Men by these Presents: that the County of Hamilton in the State of Ohio acknowledges itself to owe and for value received hereby promises to pay to bearer on the FIRST day of OCTOBER, 1929 the sum of

FIVE HUNDRED DOLLARS,

in lawful money of the United States of America with interest thereon at the rate of FOUR AND THREE QUARTERS (4¾) PER CENT. per annum payable semi-annually on the first days of April and October of each year, beginning with the first day of April 1920, and the payment of the principal hereof upon the presentation and surrender of the proper coupons therefor hereto attached, duly executed by manual facsimile signature of the County Auditor and bearing the corporate seal of the County of Hamilton, County, Ohio.

This bond is one of a series of four hundred and thirty-three (433) bonds of like date and tenor made and issued pursuant to and in conformity with the provisions of Section 6929 and 6930 of the General Code of Ohio, as amended by an act of the General Assembly of Ohio, passed April 25, 1919, and the resolutions of the County Commissioners of said County adopted on the 22nd day of September, 1919, and the 20th day of October, 1919, and also pursuant to the Petition of the Board of County Commissioners of said County to the State Highway Commissioner of Ohio, dated the 20th day of October, 1919, and the Certificate of Approval of the Highway Commissioner of Ohio, dated the 25th day of October, 1919, and also pursuant to the Petition of the Board of County Commissioners of said County to the Director of Highways of Ohio, dated the 20th day of October, 1919, and the Certificate of Approval of the Director of Highways of Ohio, dated the 25th day of October, 1919, and also pursuant to Section 1223 of the General Code of Ohio, for the purpose of paying the cost and expense of the work of improvement known as the Cincinnati Louisville Road, also known as I. C. H. No. 38, Section D.

It is hereby certified and recited that all acts, conditions and things required by law to be done precedent to and in the issuance of this bond and of the series of which it forms a part, have been done, happened and performed in regular and due form, and that the total indebtedness of the County of Hamilton, Ohio, including this bond and the series of which it forms a part, does not exceed any constitutional or statutory limitation of indebtedness.

The County of Hamilton, Ohio, through its Board of County Commissioners has by proper resolution pledged its faith and credit to the payment hereof.

In Witness Whereof, the County of Hamilton, Ohio, has caused this bond to be signed by its Board of County Commissioners, countersigned by its Auditor and the seal of the County Commissioners to be affixed, and the coupons hereto attached to be signed by the facsimile signature of the County Auditor at Cincinnati, Ohio, as of the first day of October, 1919.

No. 433

Countersigned by the Auditor of the County of Hamilton, State of Ohio

TOR

of the transferee. The interest is sent to the person whose name appears as the registered owner.

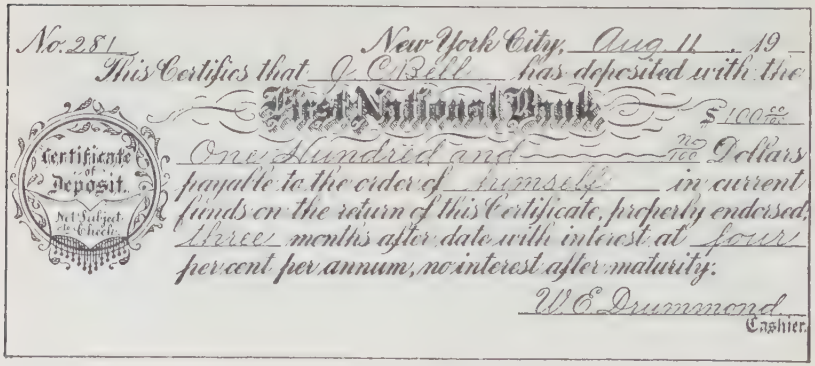
(2) *Coupon bonds* are so called because coupons are attached to cover the payment of interest.

As a rule, coupon bonds do not have the names of the owners upon them, so that they may pass from hand to hand by delivery. Each bond has small certificates attached representing the interest upon the bonds for a certain period. There are as many of these certificates as there are interest-paying periods for the life of the bond. These coupons are cut off as they become due, and are presented for payment at a designated place.

A bond may contain, in addition to the negotiable promise, many other conditions and stipulations. If the bond is issued by a corporation, it will ordinarily be secured by a deed of trust on the property of the corporation.

§ 74. **Certificate of deposit.** — A certificate of deposit is a receipt for money deposited in a bank. It is generally issued by banks to customers who deposit money on time at a low rate of interest. It is in legal effect, if not in form, a promissory note, and the principles applicable to notes should be applied to certificates of deposit. It may be either negotiable or non-negotiable. Whether it is the former depends upon the terms of the instrument as in the case of other promissory notes. When not negotiable, it may be transferred by assignment.

The following is the form of a certificate of deposit:


No. 281 New York City, Aug 11 19
This Certifies that J C Bell has deposited with the
First National Bank $100 00/100
One Hundred and 00/100 Dollars
payable to the order of himself in current
funds on the return of this Certificate, properly endorsed,
three months after date with interest at four
per cent per annum; no interest after maturity.
W E Drummond
Cashier.
Certificate of Deposit.
Not Subject to Check.

QUESTIONS FOR DISCUSSION
(Oral)

1. "Thirty days after William Hohenzollern has regained the Kaisership I promise to pay to the order of Franz Stascheibaum One hundred dollars. August Schultz."
How much would you give for this note? State reasons.

2. "I promise to pay to W. H. Roe, or to any person who may have possession of this written instrument the sum of Twenty-five dollars. J. Doe."
Is this a promissory note? What are the essentials of a promissory note?

3. What are the advantages of a registered bond?

4. Greene's private secretary gave the Motor Sales Corporation a $400 note as final payment on an automobile bought by Greene. The note was signed as follows:

"James E. Greene
By Robert Roe."

Is this note enforceable against Greene? Why would you hesitate to accept it?

5. How would you ascertain whether a bond is negotiable?

6. "Due R. Olsen on account Eight Dollars which I will pay him or order on demand. (Signed) B. B. Black."
Could this writing be passed from hand to hand as a negotiable instrument?

7. How can a business man use a certificate of deposit to advantage?

8. The holder of a note failed to present the note to the maker for payment. The maker proves that he had the money ready for payment on the due date, but since that time he has had some disastrous business losses, and he argues that he need not pay. What is your opinion?

9. Do you understand that a non-negotiable note is without value, or that it is merely treated like ordinary contracts?

10. Test the following statements:

(a) "Notes issued by corporations are called bonds."
(b) "All bonds are negotiable instruments."

11. "Three months after my nephew, Joe Smith, becomes of age I shall pay him or bearer Forty Dollars.

John J. Smith."

Is this a negotiable instrument? (13 Ill. 604.)

12. A note payable on demand was issued January 2, 1920. The maker could not pay at that time because of lack of funds. Today he is a millionaire. Would you now sue the maker if he refused to pay?

13. Compare the liability of the makers of a joint note with that of the makers of a joint and several note.

14. Someone has said that "a certificate of deposit is a note receivable and also a note payable." Explain just what is meant.

15. Jerry makes a note payable sixty days after Easter. Is the date of payment at a future determinable time?

CASE PROBLEMS
(Written or Oral)

No. 83

Purviance, being indebted to Jones, signed a note for the amount and placed it in the bank for the latter's benefit. Nothing further was done until some years later. After Purviance died, Jones filed his claim on the note which was found by the administrator in a safety deposit box rented by Purviance. Can Jones collect on this note? (21 N. E. 1099.)

No. 84

Langford induced Lary to write his name on a blank sheet of paper. Langford then wrote a promissory note over this signature which he transferred for value, to Nance, who had no knowledge of Langford's trick. Must the "maker" (Lary) pay Nance? (5 Ala. 370.)

No. 85

"I promise to pay to the order of A. A. McLeod, Two Hundred Dollars." This instrument was properly dated and signed. Is it a negotiable promissory note? When is it due? (61 N. Y. 73.)

No. 86

Roe gave a note to Miller which was made payable "on or before" a day named. Miller sues upon it as a negotiable note. Roe contends that it cannot be a promissory note since it is not payable on a certain day. Is his contention valid? (31 Mich. 421.)

No. 87

Roe and Doe execute a promissory note payable to Black. The note is now due and unpaid. Black brings an action on the note against Doe who contends that the action cannot be brought against him without joining Roe as a co-defendant. Is he right?

No. 88

Is the following promissory note negotiable?

> $100.00 "Los Angeles, Calif., Jan. 10, 1927.
> Thirty days after date I promise to pay to John Jones, or order, services of the value of One Hundred Dollars, value received. *Richard Roe.*"

No. 89

Is the following a promissory note or a duebill?

> "Oakland, California, December 1, 1927.
> I have borrowed from D. D. Dunning twenty-five dollars ($25.00). *Peter Sterling.*"

Chapter XVII

CHECKS

Keep in mind these questions when studying this chapter:

1. **Are there advantages in making payment by check?**
2. **When must a check be presented for payment?**
3. **For what warranties is the drawer of a check liable?**
4. **What is the effect of certification of checks?**
5. **Are bank drafts preferable to personal checks?**

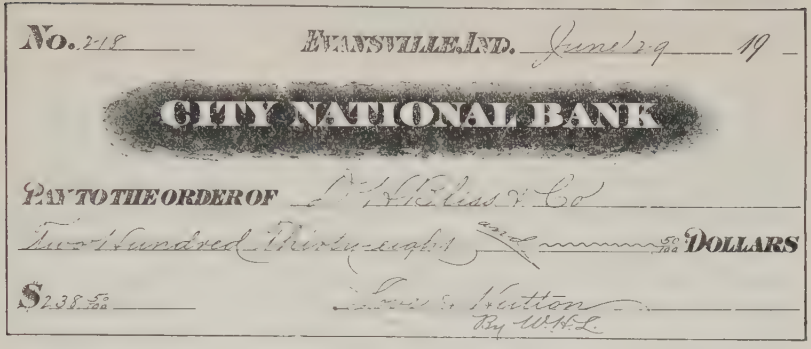
§ 75. **Definition.**—A check is a written order payable on demand, drawn on a bank by a depositor, designating to whom he wishes the bank to pay the money. It is an instrument by which a depositor seeks to withdraw funds from a bank.

A check is a bill of exchange, drawn on a bank, payable on demand. Except when otherwise provided, the Negotiable Instruments Law applicable to a bill of exchange payable on demand applies to a check. (N. I. L.)

No special form of check is necessary, but it is best to use the forms prepared by the bank. These forms are designed so that the following facts may be set forth: (1) the date, which includes the place, the month, day of the month, and year; (2) the number of the check; (3) the name of the bank or banking firm on which it is drawn; (4) the name of the person to whom the money is to be paid, called the payee; (5) the amount, which is written in figures in one location, and in writing in another; and (6) the signature of the drawer, which is the name of the depositor, or his name and the name of the person authorized to sign it.

Care in Writing Checks.—Great care must be exercised in writing checks. It has been held that: "If, by an act or negligence on the part of the drawer, as by so carelessly writing a check as to render it easily open to material alteration without leaving evident traces of such alteration, the customer has furnished the opportunity for the fraud which has deceived the bank, he must suffer the just consequences of his carelessness by bearing the loss himself." (4 Bing. 253.)

The following is the common form of a bank check:



§ 76. **Advantages of checks.**—The several advantages of making payments by the use of checks instead of in coin or currency are:

(1) Checks can be conveniently and safely sent by mail, while coin or currency cannot be so sent.

(2) A paid check is evidence of payment having been made.

(3) Money need not be kept on hand to meet obligations.

(4) Payments made by check can be readily traced. There may be occasions when this would be valuable information.

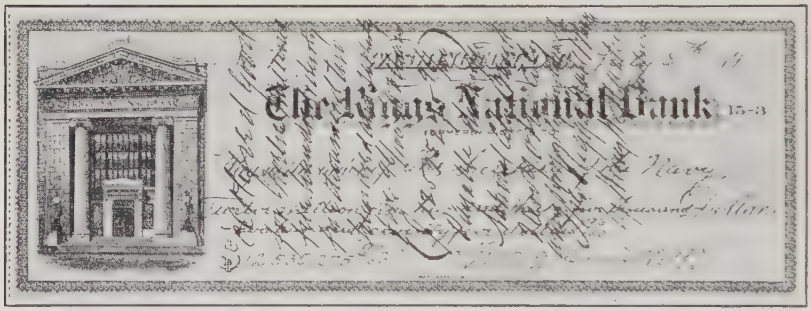
§ 77. **When payable.**—A check is payable on presentation or demand; it is for immediate use. The implied contract between the parties is that it shall be presented for payment within a reasonable time, that is, without delay. If the payee or holder retains a check, and the bank fails, the loss falls upon the holder, and not upon the drawer or maker, providing there was sufficient funds on deposit to pay it.

When the parties all reside in the same place, the holder should present the check not later than the following business day, and when payable at a different place from that in which it was received, the check should be forwarded on the same or the next succeeding secular day for presentment at the bank for payment.

§ 78. **Warranty of drawer.**—The drawer of a check warrants (1) that he has sufficient funds on deposit to pay the

check when presented; (2) that the bank will pay it on presentation; and (3) if the bank does not pay it he will, providing due notice of dishonor is given.

(1) *Stop payment order.*—The drawer of a check may stop or revoke its payment at any time before its presentation and demand for payment, by giving notice to the bank upon which it is drawn. This is upon the theory that the check is simply an order given by the principal upon his agent, and that it is always open to the principal to countermand an order before it is executed. The drawer's death also works a revocation of the authority of the bank to pay the check. If the bank pays it without knowledge of the death of the maker, the payment would be legal.



REPRODUCTION OF CHECK RECEIVED BY THE UNITED STATES GOVERNMENT IN PAYMENT OF TWO BATTLESHIPS.

(2) *"Bad check law."*—Many of the states have passed statutes commonly known as the "bad check law." The purpose of this law is to discourage the issuing of checks with insufficient funds in the bank to meet payment.

Formerly, the burden was placed on the recipient of a bad check to prove the intent to defraud. Statutes now require the maker of the check to show the absence of fraudulent intent. Thus:

"As against the maker thereof, the making of a check, payment of which is refused by the drawee, shall be *prima facie* evidence to defraud and of knowledge of insufficient funds with such bank, provided such maker shall not have

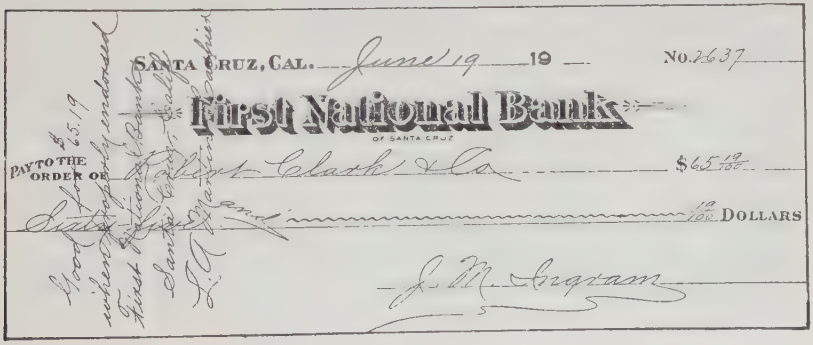
paid the drawee or holder thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check has not been paid by the drawee."

§ 79. **Certification.**—A person to whom a check is tendered may be in doubt as to whether the drawer has sufficient funds on deposit to pay it, or he may want assurance that the funds will not be withdrawn before it is presented for payment. For this reason, he frequently demands what is technically known as a *certified check*. In dealing with the government, bidding on contracts, or meeting court obligations, a certified check is a necessity.

§ 80. **How certified.**—No particular form of words is essential to the certification of a check. It is usually done by the bank writing or stamping across the face "good" or "certified" and the proper official signing it. The cashier is the proper person to perform this function, though it may be done by an authorized teller or the president. A bank is under no legal obligations to certify a check; it does so merely as an accommodation for depositors.

If the holder obtains the certification, he thereby releases the drawer from further liability, the bank becoming the sole debtor. However, if the drawer has the check certified, the drawer becomes a guarantor of the solvency of the bank, and that the bank will pay the check.

The following is a common form of a certified check:


SANTA CRUZ, CAL. June 19 19 No. 2637
First National Bank
OF SANTA CRUZ
PAY TO THE ORDER OF Robert Clark & Co
$65 12/100
DOLLARS
J. M. Ingram

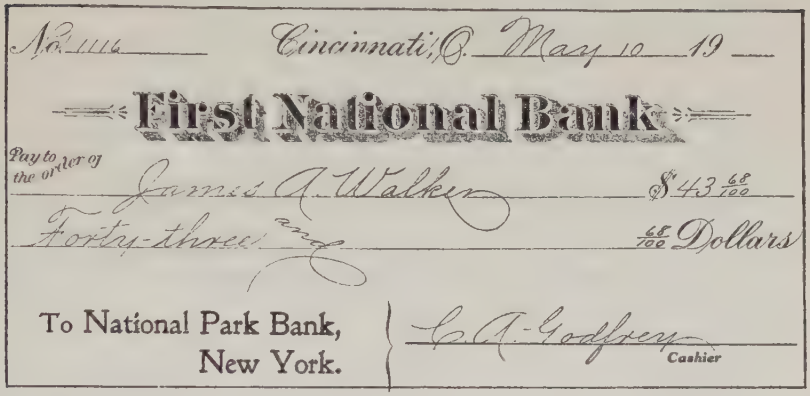
§ 81. **Rights of holder against the bank.**—Until a bank accepts or certifies a check, it is in no way bound to the holder. This is true whether the maker has sufficient funds on deposit to pay it or not. In other words, a holder of a check has no right of action against a bank for refusal to pay a check not certified. The bank may refuse without assigning a reason. The rights of the holder are against the maker of the check and those who transferred it to him. It is different if the check is certified. In such a case the bank is bound to pay it to a proper holder whenever presented. The right of the holder to sue the drawer is transferred to a right to sue the bank, thus the effect of certification is merely shifting the persons against whom a right of action may be maintained.

A bank has well-defined duties to perform for its depositors, and if a bank should decline to pay a check without assigning a justifiable reason for so doing, it would be liable to the depositor for any damages the depositor sustained in an injury to his credit through the failure of the bank to pay checks properly drawn.

Naturally, if there are no funds in the bank to the credit of the depositor, the bank need not honor the checks of the drawer. The rule is equally true where the funds are insufficient to pay the check in full. A bank is not obliged to make a part payment on the check to the amount of the funds on deposit. Likewise, the bank may refuse to pay the check if the depositor owes the bank a debt past due, larger in amount than the sum on deposit.

§ 82. **Bank draft.**—A bank draft is a check drawn by one bank on some other bank. It is evidence that the bank drawing the draft has money on deposit with the bank on which it is drawn. Banks usually keep money deposited in other banks in large commercial centers. These banks are called *correspondents* or *correspondent banks*. Banks sell drafts to their customers, who make use of them in making remittances from one part of the country to another. This is a desirable method of remitting payment. The draft should always be made payable to the person obtaining it from the bank. It can then be indorsed to whomever it is desired to transfer it, and it will serve as a receipt if proof of payment is desired.

Following is a common form of a bank draft:


No. 1116 Cincinnati, O. May 10 19__

First National Bank

Pay to the order of James A. Walker $43 46/100

Forty-three 46/100 Dollars

To National Park Bank, New York.

C. A. Godfrey Cashier

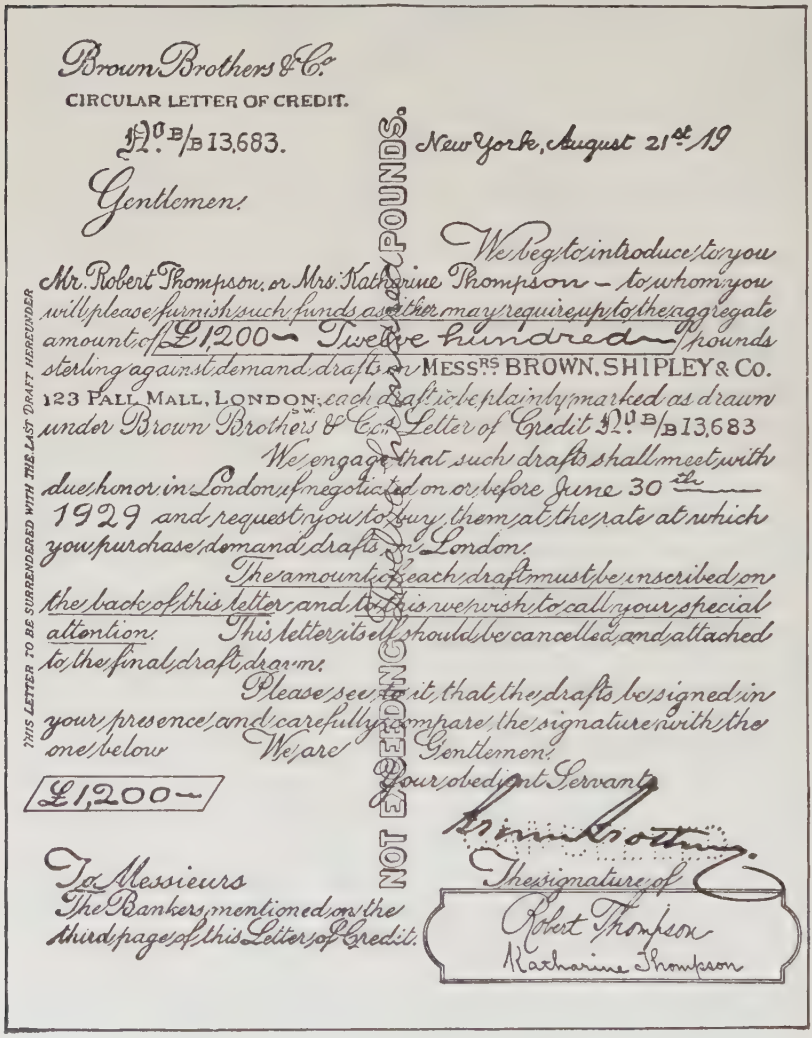
§ 83. **Letters of credit.**—A letter of credit is a request from one person to another to make advances to a third person on the credit of the one who gives the letter. Or, as Judge Story states it in his book on Notes and Bills, "It is an open letter of request whereby one person, usually a banker, requests that some other person or persons advance money, or give credit, to a third person named therein, for a certain amount, and promises that he will repay the same to the person advancing the money."

A letter of credit is generally limited as to time or amount, but it may be unlimited as to either or both. It may also be a general letter of credit, or a special letter of credit. It is general if addressed to no particular person. It is special if addressed to a particular person or corporation, and in such a case should be presented to the person or the corporation indicated. They are ordinarily drawn for the benefit of a particular person, and are not negotiable.

With a letter of credit the holder may go to any of the banks named therein and ask for a portion of the sum designated. This money will be paid in the coin of the country, at the prevailing rate of exchange. A letter of credit is ordinarily drawn for the benefit of a particular person, and is not negotiable. The holder identifies himself by writing his name, and the signature must correspond with the one on the letter of credit.

Traveler's checks and letters of credit are issued by express companies. Traveler's checks are exceptionally convenient, since hotels generally cash them for their guests.

FORM OF A TRAVELER'S LETTER OF CREDIT



Brown Brothers & Co.

CIRCULAR LETTER OF CREDIT.

No. B/B 13,683. New York, August 21st 19

Gentlemen:

We beg to introduce to you Mr. Robert Thompson, or Mrs. Katharine Thompson — to whom you will please furnish such funds as either may require up to the aggregate amount of £1,200— Twelve hundred pounds sterling against demand drafts on MESSRS. BROWN, SHIPLEY & Co. 123 PALL MALL, LONDON; each draft to be plainly marked as drawn under Brown Brothers & Co.'s Letter of Credit No. B/B 13,683

We engage that such drafts shall meet with due honor in London, if negotiated on or before June 30th 1929 and request in your to buy them at the rate at which you purchase demand drafts on London.

The amount of each draft must be inscribed on the back of this letter and to this we wish to call your special attention. This letter itself should be cancelled and attached to the final draft drawn.

Please see to it that the drafts be signed in your presence and carefully compare the signature with the one below.

We are Gentlemen

Your obedient Servants

Brown Brothers.

£1,200—

The signature of

Robert Thompson

Katharine Thompson

To Messieurs

The Bankers mentioned on the third page of this Letter of Credit.

THIS LETTER TO BE SURRENDERED WITH THE LAST DRAFT HEREUNDER

NOT EXCEEDING POUNDS

QUESTIONS FOR DISCUSSION
(Oral)

1. Which of these instruments are checks?

(a) "To the Wilson State Bank:
On demand pay to William White or order Twenty Dollars. James Doe."

(b) "To the Treasurer of the Wholesale Fruit House:
On demand pay to H. C. Dowe or order Forty Dollars. Charles Roe."

(c) "On April 14 pay to the order of E. Harrison One hundred and ninety-nine 92/100 Dollars. J. T. Harrison."
To Citizens Bank
Minneapolis, Minn. (41 Minn. 488)

2. The following certification was placed on a check by a bank at the request of the drawer of the check:

"Maverick National Bank. Certified. Pay only through Clearing House.
J. W. Work, Cashier.

The bank became insolvent. Can the holder recover from the drawer? (156 Mass. 458.)

3. On another occasion the bank at the request of the payee certified a check by writing on its face the following:

"Maverick National Bank. Certified. Pay only through Clearing House.
A. C. Domett, Asst. Cash.

When the payee returned to have the check cashed the bank was insolvent. Who suffers the loss?

4. The drawer secures the certification of a check. Does this affect his liability?

5. Manley gave Baker his check upon a certain bank in the city in which they both reside. Five days thereafter the bank became insolvent. Baker had not presented the check for payment. Upon whom will the loss fall?

6. What, if any, are the advantages of using checks, instead of money?

7. Do you consider the warranties of the drawer unfair to him.

8. In 123 U. S. 105 we are told that "a banker's draft need not be presented with the same promptitude as the check of an individual." Can you suggest a reason?

9. Black carried a check for six months before presenting it for payment. Does this delay discharge the drawer?

10. A stranger residing in a distant city is ready to take a shipment of automobiles from you for the sum of $15,000. Terms; cash. In what form will you demand payment? Give reasons for your answer.

11. The holder of a check presents it to the drawee bank for payment. Although there are sufficient funds on deposit to pay it, the bank refuses payment without giving any reason. What are the rights of the holder against the bank? (10 Wall [U. S.] 152.)

12. How do you account for the statutes known as "bad check laws"?

13. A check comes into your hands on which there has been an erasure and a change of date. Is this a valid check? At what disadvantage would you find yourself?

14. Brown, who had given White a check on July 1 at 9 A. M., died on that day at 2 P. M. White presented the check at 3 P. M. and received the money. The administrator of Brown's estate sues the bank for paying the check after Brown's death. Suggest a defense for the bank.

15. What is the purpose of letters of credit? Are they negotiable instruments?

CASE PROBLEMS
(Written or Oral)

No. 90

A physician sent his patient a bill for $175. The patient wrote the doctor a check for $150 and at the bottom in the

left-hand corner wrote these words: "In full of account." The doctor accepted the check and cashed it. Later he sought to recover the remaining $25. Result?

No. 91

Millard, a captain in the service of the United States army, was given a check by the government for $889. The bank had once paid the check on a forged indorsement of Millard's name. Ascertaining and exposing the forgery, and recovering possession of the check, Millard now presents the same and demands payment to himself. This the bank refuses to do. Can Millard recover from the bank? (10 Wallace 152.)

No. 92

A check dated September 2, was misplaced by the payee, Sterling. The drawer stopped payment on the check and issued a second check, which was duly cashed. Ten days later Sterling found the first check, and after he had changed the date to September 12 handed it to the plaintiff who knew nothing about the fraud and gave value. Will the plaintiff be successful in his suit against the drawer? (46 Mis. [N. Y. Sup.] 603.)

No. 93

Adams gives his check to Long, who indorses and delivers it to Rich. Rich transfers it to Davis. Davis has the bank certify the check. Soon thereafter Davis presents it to the bank for payment, but the bank refuses to pay it on account of insufficient funds to the credit of Adams. What parties are liable on the check?

Chapter XVIII

FORM AND INTERPRETATION

Keep in mind these questions when studying this chapter:

1. **What are the essential elements of a negotiable instrument?**
2. **How should the amount payable be expressed?**
3. **To be fully effective must the instrument be delivered?**
4. **What are non-essentials of a negotiable instrument?**
5. **How does failure of a consideration affect negotiability?**

§ 84. **Essential elements.**—An instrument to be negotiable must conform to the following requirements:

(1) *It must be in writing and signed by the maker or drawer.*

The writing may be executed with pen and ink, lead pencil, typewriter, or it may be printed. The maker or drawer may sign his name by means of a rubber stamp; he may legally substitute for his name a cipher, figures, or other characters, and he may "make his mark," although able to write. But a mark does not prove itself like a signature.

When the signature is indicated by a "mark," it is customary to have the mark identified by witnesses, but this is not necessary to the validity of the signature.

Ordinarily, the maker signs his name at the lower right-hand corner, and this is the better practice, but it is not necessary that it be written there to be legal. It may be written in the body of the instrument or even at the beginning of it. If it is not in the usual place, the responsibility of showing that it was the intention of the maker to be bound by the instrument will rest upon the holder, not the maker.

All commercial papers should be signed by the party responsible for payment, or by a lawful agent. An agent should have a power of attorney as evidence of his authority. (See § 175.) In the case of a corporation, the signature must be made by a legally authorized official; and those accepting commercial paper signed by a corporation must know that the person who signed it had authority to do so. When commercial

paper is signed by a partnership or corporation, the firm name must appear first, and under this the name of the person authorized to sign.

No one should sign papers for another without writing his own name, preceded by the word "by" or "per" underneath the name signed. If he signs his name underneath that of the principal without using these words, he may then be held jointly liable with the principal or maker. The use of "per" or "by" shows that he is merely a scribe who writes for another.

(2) *It must contain an unconditional promise or order to pay a sum certain in money.*

"Due Currier and Baker, $17.14" was held not to be a promissory note, but simply an admission or acknowledgment of an indebtedness. (40 Conn. 349.)

The order of an employee, drawn on his employer, directing that the payment be made out of the salary to become due the employee, is not an unconditional order. The salary may never become due. (10 Modern 294, 317.)

The written promise to pay "out of the proceeds" of the ore to be mined, stated in a note taken in payment of a mine, was held to be a contingent obligation (a simple contract) and not an unconditional promise, since there might never be any proceeds. (4 N. Y. 159.)

To be negotiable the instrument must be payable in money and not in commodities. "We promise to pay A or order $1,000 in cotton" was held to be a non-negotiable note. (58 Ala. 451.)

The instrument may specify a particular kind of money, as gold eagles, silver dollars, etc. It may also be payable in foreign money, provided it is current money in the place of payment.

In writing a negotiable instrument, the amount payable is usually indicated by writing the words in the body, and figures in the margin. It not infrequently happens that the amount in figures may differ from the amount expressed in words. In such a case the words prevail, and the figures are treated as an error. If the words are ambiguous or uncertain, reference may be had to the figures to confirm the amount. If the amount is written in figures only it will suffice. The words "Fife hundred" and "Four hund" have been held to mean Five hundred and Four hundred, respectively.

The sum payable is a sum certain, although it is to be paid: (a) with interest, (b) by stated installments, (c) with ex-

change, or (d) with costs of collection or an attorney's fee, in case payment shall not be made at maturity.

A negotiable instrument must not contain a promise or order to do any act in addition to the payment of money, but if it is otherwise negotiable, it may give the holder an election to require something to be done in lieu of payment of money.

Richard Roe promised to pay to the order of John Doe "Ten dollars or ten bushels of wheat at the holder's option." Doe may elect, when the note is due, which he will take in payment, and the note is therefore negotiable. The election is on the part of the payee, or his assigns, and not the maker.

(3) *It must be payable on demand or at a fixed or determinable future time; that is, it must be certain as to the time of payment.*

An instrument is payable on demand: (a) where it is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time of payment is expressed.

By a "fixed or determinable future time" is meant that the instrument must be payable: (a) at a fixed period after date or sight; or (b) on or before a fixed or determinable future time specified therein; or (c) on or before a fixed period after the occurrence of a specified event, which is certain to happen, though the time of the happening be uncertain.

An instrument payable on demand—that is, immediately—becomes past due after a reasonable time.

If payable at or within a certain time after one's death it is good. "Thirty days after death I promise to pay Cornelius Carnwright, or order, $1,500, with interest," was held to be a negotiable note because the date was determinable. (127 N. Y. 92.)

A note payable at the maker's option, "on or before" a day named, or "within one year after date" is certain as to time and is negotiable. The maker may pay sooner if he wishes, but this option if exercised, would be a payment in advance of the legal liability to pay and nothing more. (31 Mich. 421.)

"For value received, I promise to pay Oliver James Rice, or order, the sum of $1,500 when he is twenty-one years of age, with interest from date. (Signed) Rachel G. Rice," was held to be non-negotiable for the reason that Oliver might never attain his majority. A note payable upon a contingency is not negotiable even though the event does actually take place. (Rice v. Rice, N. Y. Supp. 97.)

(4) *It must be payable to order or to bearer.* The omission of this requirement will render the instrument non-nego-

tiable, although it may conform to every other essential. It is considered payable to order when payable to the order of a specified person, or to him or to his order, thus, "Pay to Wm. Baldwin or order" and "Pay to the order of Wm. Baldwin," are legally the same.

The payee must be named, or otherwise indicated therein, with reasonable certainty. This may be done without inserting the name of the payee, but his title may be given as "Pay to the City Treasurer of Chicago, Illinois."

The instrument is payable to bearer: (a) when it is expressed to be so payable; or (b) when it is payable to a person named therein or bearer; or (c) when the name of the payee does not purport to be the name of any person; (d) when the last or only indorsement is an indorsement in blank (that is, an indorsement of the indorsee only).

"Pay to Wm. Baldwin or bearer" is legally the same as "Pay to the bearer," and is negotiable in form; but "Pay to the bearer, Wm. Armstrong" is not negotiable in form.

When the name of the payee does not purport to be the name of a person, as "Cash," or "Pay roll," or "Expense," and the like, the instrument is payable to bearer.

(5) *Where the instrument (a bill of exchange) is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.*

$2,771.62. Montevallo, June 1, 1858.

Ten months after date pay to the order of John S. Storrs, Two thousand seven hundred and seventy-one and 62/100 Dollars, Value received, and charge to the account of

To ....., Mobile, Ala. *D. E. Watrous.*

In the foregoing the drawee is neither named nor indicated, and it was therefore held not to be a bill. (39 Texas 573.)

"Mobile, Ala., Nov. 16, 1867.

Steamer C. W. Dorrance and owners will please pay W. B. Seawell & Co. or order Twenty-two hundred dollars, and charge the same to the account of your, etc. *R. Swan.*"

In the last example it was held that the drawee was indicated, although not named, and it was therefore a bill. (35 Ala. 476.)

§ 85. **Delivery.**—A negotiable instrument is not ordinarily effective until it is delivered. It must have passed out of the hands of the maker or drawer, and until it does so it is incomplete and may be erased, cancelled, or revoked. A note found among the maker's papers after his death would entail no obligation on his estate. But if a completed paper should be wrongfully taken from the possession of the signer and get into the hands of a holder in due course, the maker would be held liable.

§ 86. **Authority to fill blanks.**—Where the maker of a negotiable instrument intrusts it to another with the blanks not filled, such an act carries with it implied authority to fill the blanks and perfect the instrument. This does not confer authority to make a new instrument by erasing what is written, or to fill the blanks with stipulations contrary to the express orders of the maker. However, such an instrument in the hands of an innocent holder will be enforceable.

Brooklyn, Sept. 20, 1858.

$1,585.90

after date promise to pay to the order of December 23, dollars at value received.

(Signed) *Geo. B. Ives.*

A blank note in the above form was delivered to Yale as a memorandum and not to be used as a note. Yale filled in the blanks as a note payable to his own order, and indorsed it to the plaintiff. The holder was held entitled to collect it. (2 Allen 236.)

§ 87. **Certain non-essentials.**—The absence or presence of the following conditions will not affect the validity and negotiable character of commercial paper:

(1) Date.
(2) Place.
(3) Value received.

(1) *Date.*—It is not necessary that a negotiable instrument be dated. But like all other contracts, it should be dated to avoid possible difficulties. In the absence of a date, it is presumed to take effect from delivery. In most jurisdictions

the holder—if the place for the date be blank—may fill in the blank with a date. It may be ante-dated or post-dated. If it be an impossible date (as April 31), the date of delivery usually governs, although it has been held that such date is April 30. It is immaterial whether an instrument is dated on Sunday or not, providing it was not in fact made and delivered on that day.

(2) *Place.*—The instrument need not specify the place where it was drawn or the place where it is payable. If it does not state the place of payment, it is payable at the residence or place of business of the maker, or wherever he may be found.

(3) *Value received.*—The paper need not state the value given, or that any value had been given therefor. For the same reason the words "value received" or "for value received," so commonly inserted in some instruments, are in no way essential to their validity. They were at one time requisite to make a note negotiable, but it is now well settled that they express only what the law itself implies from the execution of the paper. Where the instrument has passed into the hands of a holder in due course, want or failure of consideration between the parties will be no defense.

§ 88. **Consideration.**—Every negotiable instrument is deemed to have been issued for a valuable consideration, until the contrary is proved. Between the original parties to it—that is, the maker and the payee of a note or the drawer and payee of a bill of exchange—the instrument is like any simple contract, and the lack of consideration between the parties may be shown. However, if the instrument is transferred to a holder in due course, lack of consideration between the original parties does not affect the rights of the holder.

§ 89. **Days of grace.**—Prior to the adoption of the Negotiable Instruments Law, a negotiable instrument, payable at a future time, was not deemed due and payable until the expiration of three additional days, termed "days of grace." Days of grace have been generally abolished by statute. The rule allowing days of grace arose out of the custom of merchants to

enable the debtor to secure funds for payment. Today, with the rapid and comparative ease of communication the reason for days of grace has practically disappeared.

QUESTIONS FOR DISCUSSION
(Oral)

1. The Negotiable Instruments Law requires that the instrument must contain an unconditional promise or order to be negotiable. What disadvantage would there be in recognizing the validity of such an instrument if made orally?

2. Why were days of grace formerly allowed? Does the reason still exist?

3. The N. I. L. provides that the instrument, to be negotiable, must be signed by the maker or drawer. Does this mean that the instrument must be subscribed? What is the difference between "signed" and "subscribed"? Illustrate.

(b) Will an instrument be negotiable if it gives the holder the option to require some act in lieu of the payment of money? Illustrate.

4. How must a negotiable instrument be signed?

5. "A 'sum certain' means an amount which can be definitely fixed and computed beforehand." (a) Does a note which provides for attorney's fees contain a promise to pay a sum certain? (b) Would your answer be the same if it provided for payment with exchange?

6. Upon the death of Larkson, a negotiable note payable to Brown was found in his desk. May Brown collect the note?

7. Congressman-elect Cline executed two notes for $1,000 each. One is payable upon his death; the other as soon as he takes his seat in Congress. Congress convenes next week. Are both of these notes negotiable? Why?

8. What reasons can you suggest for the courts compelling strict compliance with the requirements in respect to a valid negotiable instrument?

9. (a) "Guilford, Nov. 29, 1926.

For one Hinckley knitting machine warranted I promise to pay J. H. Wells or bearer $30 one year from date.

A. H. Johnson."

Is this an unconditional promise? (8 Hun. [N. Y.] 309.)

(b) What would be your answer if the above paper had read "For one Hinckley knitting machine, if as warranted, I promise," etc.

10. A note for $100 is payable "with interest at ten per cent per annum from date until paid; seven, if paid when due." Is this a sum certain in money? (33 Minn. 144.)

11 (a) State Representative Collins proposes a statute requiring all negotiable instruments to be executed with pen and ink. Would you favor such a law?

(b)

> Ich verpflichte mich hiermit Karl Halz oder dem Inhaver dieses am ersten Maerz 1927, $100 abzugeben.
>
> (Signed) *Wilhelm Kaiser.*

Translated: "I promise to pay to Karl Halz or bearer on March 1, 1927, $100. Wilhelm Kaiser."

Would this be treated as a negotiable instrument if executed in the United States?

12. Kirby Thompson promises in writing to pay his debt to you or order, as soon as he regains his health. Why would you have a hesitancy about accepting this note? Explain.

13. (a) "The date of maturity must be specifically stated in the instrument or it must be stated with such certainty that the time it has to run can be definitely computed."

(b) "The date of maturity is a time certain to come."

Compare these statements and express your preference.

14. Mr. Banker said he would not honor an instrument which did not contain the words "or order," "or bearer." Give reasons justifying this statement.

CASE PROBLEMS
(Written or Oral)

No. 94

Dallas, Texas. July 10 19 —

Dallas National Bank 32-64

Pay to Axis Refining and Construction Company ~~or bearer~~ $2500.00

Twenty-five hundred no/100 Dollars

For a/c constructing refining switch and loading racks Winchester, Ky.

Mutual Oil & Refining Co.
By C. L. Bell, President

This check was held in 263 S. W. Rep. 745 as not negotiable. Why? Is it properly signed in order to bind the Oil Company?

No. 95

A promissory note is payable in monthly installments. Upon default in payment of any installment or interest, the whole note is to become due. To what extent is the negotiability of a note affected thereby?

No. 96

Brown works for a certain packing company, and is known among the employees as Number 211. He borrows a sum of money from a fellow workman and gives his note in payment, signing it "Number 211." Can Brown be held liable as the maker of this note?

No. 97

Montpelier, Vt., Nov. 17, 1914. Two years from date for value received I promise to pay J. S. King, or bearer, one ounce of gold. (Signed) *A Prospector.*

Is an ounce of gold money? Is this a negotiable note or a contract for the delivery of merchandise?

No. 98

Adams gave Black his promissory note, whereby he agreed to pay Black, or order, one year after the death of his father, who was then living, $500 out of any money he might receive from his father's estate. Is such a note negotiable?

No. 99

Is the following a negotiable promissory note?

> Dallas, Texas, March 21, 1927.
> On or before three months after date I promise to pay to John Smith the sum of $25, with interest at the rate of 10% per annum from date until paid.
> *B. B. Bowers.*

No. 100

A merchant signed a number of blank checks and instructed his bookkeeper to fill them out with names of payees and amounts as needed in the business. The bookkeeper made the checks for large amounts and for purposes not authorized. The bank on which the checks were drawn cashed them. Can the merchant be charged by the bank for these checks? (221 Pa. St. 599.)

No. 101

In Hogue v. Williamson, 85 Texas 553, the plaintiff brought suit against Williamson upon a written instrument which read as follows:

> Saltillo, Jan. 25, 1888.
> On or before May 1, 1888, I promise to pay C. C. Hogue or order, One thousand Mexican silver dollars.
> $1,000 Mex. (Signed) *Geo. S. Williamson.*

Is a written instrument payable in foreign money negotiable?

Chapter XIX

INDORSEMENTS

Keep these questions in mind when studying this chapter:

1. **How are negotiable instruments transferred?**
2. **What is the meaning of the word indorse?**
3. **How many kinds of indorsements are there?**
4. **Is there any liability attached to an indorsement?**
5. **In what respect is an accommodation indorser liable?**

§ 90. **Negotiation.**—An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by indorsement and delivery. Any owner may negotiate it.

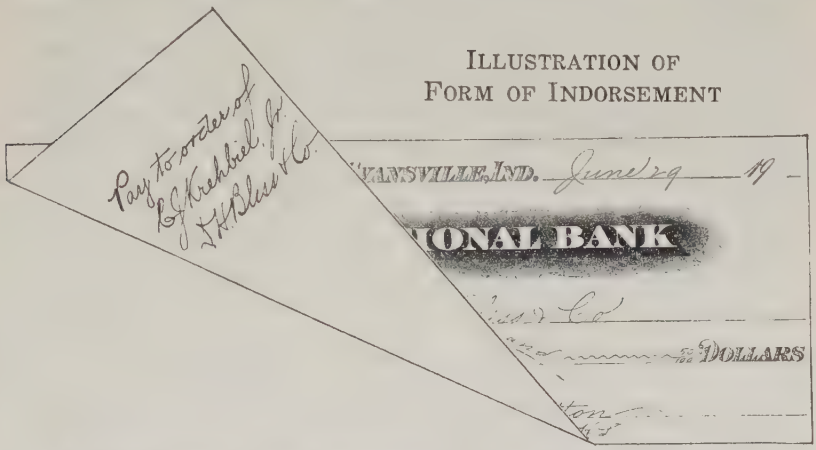
The party who writes his name on the back of a negotiable instrument for the purpose of transferring it is the *indorser;* the one to whom it is transferred is the *indorsee.* If a note or check is made payable to John Parker, he is the payee. The payee may then indorse the instrument, and the new holder becomes the indorsee.

(1) *Transfer by delivery.*—A negotiable instrument, payable to bearer, is transferable by delivery without indorsement. A draft or note indorsed in blank is in legal effect the same as payable to bearer. The delivery may be voluntary, as where one hands it over to another; it may be involuntary, as in case it is lost or stolen. In both instances the title passes to the holder.

§ 91. **Indorsements.**—The usual mode of transferring the title to a negotiable instrument payable to order is by indorsement. It may also be indorsed for the purpose of strengthening the security of the holder. The word indorse is derived from two Latin words, *in* and *dorsum,* which mean to write *on the back.* An indorsement is usually written on the back of the instrument, but it is valid if written on the face. If by reason of rapid circulation, the back becomes filled with indorsements, others may be written on another piece of paper

attached to the original. This is called an *allonge*. Unless the indorsement is dated, the negotiation is considered to have taken place before maturity.

ILLUSTRATION OF
FORM OF INDORSEMENT



§ 92. **Forms of indorsements.**—An indorsement may be special, or it may be in blank; it may be qualified, conditional, or restrictive.

(1) *A special indorsement*, frequently referred to as an indorsement in full, is one which mentions the name of the person to whom or upon whose order the sum is to be paid. The person to whom it is thus transferred must indorse it before any succeeding holder can use it.

Examples of special or indorsements in full:

"Pay to Richard Roe," and signed "Simon Smith."
"Pay to the order of Richard Roe," and signed "Simon Smith."

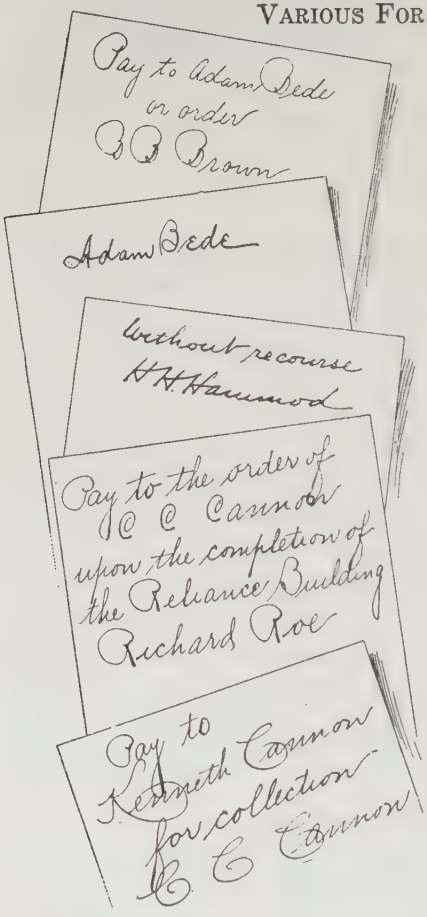
(2) *An indorsement in blank* consists in merely writing the name of the payee or holder on the back of the instrument without designating the indorsee. (The indorsement is blank in that it is incomplete.) A subsequent holder may write over an indorsement in blank any contract consistent with the character of the indorsement. Thus, a blank indorsement may be converted into a special indorsement.

The holder of an instrument indorsed in blank can not enlarge the liability of the indorser by writing above such blank indorsement "Waiving demand notice or protest," nor can he convert it into an absolute guaranty.

(3) *Qualified indorsement.*—A person who indorses a

negotiable paper, whether in blank or by special indorsement, makes himself liable to the subsequent holder if the maker fails to pay the amount at maturity. Therefore, if a holder wishes to transfer the title without assuming such liability, he may do so by a qualified indorsement. This indorsement is made by writing "without recourse," "or at the indorsee's risk" over the signature of the indorser. In this case if the holder is unable to collect anything from the maker the indorser without recourse does not legally have to pay.

VARIOUS FORMS OF INDORSEMENTS



Special Indorsement or Indorsement in Full.

Indorsement in Blank.

Qualified Indorsement.

Conditional Indorsement.

Restrictive Indorsement.

(4) *Conditional indorsement.*—If it is desired that the possession of the instrument is to pass to the indorsee, but

that the title is not to pass until the happening of some condition, such a transfer is called a conditional indorsement. Thus, "Pay to Richard Roe or order unless before payment I give notice to the contrary" is an illustration of a conditional indorsement.

(5) *Restrictive indorsement.*—By a restrictive indorsement, the title is vested in the person named as a trustee for a certain purpose, as for collection or deposit.

A restrictive indorsement stops the negotiability of the instrument. The owner has, by making such an indorsement, given notice to the world that he owns it and that the holder holds it as the agent of the owner for the purpose to which it is restricted, but not to sell it.

Common examples of restrictive indorsements:

"Pay to Richard Roe for collection," and signed "John Doe."
"Pay to Richard Roe only," and signed "John Doe."
"Pay to the order of Union Bank for Deposit," and signed "John Doe."
"Pay to Richard Roe for the account of Simon Smith."

§ 93. **Accommodation indorser.**—An accommodation indorser is one who indorses commercial paper for the purpose of lending his name to some other person as a means of obtaining credit. It is a gratuitous act on the part of the indorser for the benefit of the accommodated party, hence there is no liability on the part of the indorser to the accommodated party. As to subsequent holders, the accommodation indorser agrees that at the maturity he will pay it if the maker does not.

W. E. Marnell is desirous of obtaining a loan from a bank. He is advised by the banker that he may have the money if he will get Mr. Benjamin to sign a note with him in favor of the bank. Benjamin is willing to sign the note as an accommodation to Marnell, and he signs it as a co-maker, or indorses the note. He thus makes himself liable to the bank or any subsequent holder in case Marnell does not pay the note when due; but under no circumstances would he be liable to Marnell for the payment. The only purpose Benjamin has in this transaction is to lend his credit to Marnell who is the accommodated party.

§ 94. **Indorser's warranties.**—Every transferor of negotiable paper, by an unqualified indorsement, warrants:

(1) *That the instrument is genuine and in all respects what it purports to be.*

If the defendant should deliver to the plaintiff, without indorsement, a note made by Roe, payable to bearer, and, unknown to either the plain-

tiff or defendant, it should develop that the note was forged, fictitious or altered, the plaintiff would have a right of action against the defendant on his implied warranty that it was genuine.

(2) *That he has a good title to it.*

If a note is stolen and the thief attempts to transfer it to an innocent purchaser by forging the payee's name, he does not thereby convey title. One cannot transfer and give title to what he does not own.

(3) *That all prior parties had capacity to contract.*

If, in the first illustration, Roe were an infant, thus legally incapacitated from making a contract, the defendant would have been liable on his implied warranty that the prior parties had capacity to contract.

(4) *That, at the time of indorsement, the instrument is valid.*

The defendant would be liable on his warranty if the note were given in payment of a violation of some statute.

NOTE.—Every transferor of negotiable paper, by delivery or qualified indorsement, makes the warranties set forth above in (1), (2), and (3), and in addition warrants that he knows of nothing which would impair the validity of the instrument or render it valueless.

§ 95. **Indorser's contract.**—An indorser of a negotiable instrument contracts with the present or future holder that if the maker does not pay it at maturity he, the indorser, will, if it is properly presented for payment and protested for nonpayment and notice thereof is sent to the indorser. Each indorser is liable in the order in which he indorses and is liable to all subsequent holders. The holder has the option of suing any prior indorser.

Where the name of the payee or indorsee is wrongfully designated or misspelled, the holder should indorse the incorrect name, and underneath such indorsement his name in its correct designation or spelling, thus: "Simeon M. Smith by Simon N. Smith."

QUESTIONS FOR DISCUSSION
(Oral)

1. Discuss the validity of the following indorsements:
   (a) Adams through error placed his indorsement on the face of the note. (100 Mass. 12.)

(b) Brown's indorsement, the 21st in order, had to be made on an extra slip of paper which was pinned to the original. (194 Ala. 504.)

(c) Black's indorsement placed on a separate piece of paper which was never attached to the original. (92 Neb. 786.)

(d) William Brown indorsed as follows: "W. B." (6 Hill 443.)

2. A check is made payable to Rosco Richardson as administrator. He wishes to indorse the check so as not to be held personally liable. How would you advise him to indorse it?

3. Show the benefits of a special indorsement (a) to the indorsee; (b) to the indorser.

4. You have learned that blank indorsements may be converted into special indorsements without the permission of the previous indorser. Is this fair to the previous indorser?

5. You are the holder of two notes indorsed in blank. Over the indorsement of the first one you write, "Pay to the order of (your name)." Over the second one you write, "Notice and protest waived." Is this permissible in either case?

6. A note indorsed "John Jones" is handed to the Lincoln National Bank for collection. The bank negotiates the note. Does the buyer get good title? (15 Gray [Mass.] 178.)

7. "Pay to Carl Johnson or order as soon as he has completed my garage at 1122 Barr Street. (Signed) James McCool." What kind of an indorsement is this? Does it stop the negotiability of the instrument?

8. Which of these indorsements stops the negotiability of the instrument?

(a) "Pay to the Old National Bank for collection, John Doe."

(b) "Pay to A. A. Dodd, only, John Doe."

(c) "Pay to A. C. Andrews, John Doe."

9. Wood B. Sharpe, a lawyer, advises his clients to transfer negotiable paper either by delivery only or by indorsing it "Without recourse." He informs them that by so doing they escape all liability. Is this true?

10. Explain why you should hesitate to sign a note as an accommodation indorser?

CASE PROBLEMS
(Written or Oral)

No. 102

You identify X—— at your bank, by indorsement. The check which you indorsed and the bank cashed proves a forgery. Are you responsible and to what extent?

No. 103

J. M. Burke transferred a note by writing on the back: "I transfer my right, title and interest in same. J. M. Burke." The holder of the note brought suit against Burke as an indorser of the note. Burke contends he merely made an assignment and is not liable as an indorser. What is your opinion? (59 Okla. 219.)

No. 104

Adams lent Brown $100 and took his promissory note. Six per cent interest was agreed upon, but the space left for the rate was left blank. Adams, the holder, wrote in the figure 8. What were Adams' rights? If Adams had transferred the note to Sterling in due course, for value and before maturity, what would have been Sterling's rights?

No. 105

The bookkeeper in a large firm fraudulently made out a check to one not in the employment of the firm. After the check had been signed by the proper official the bookkeeper obtained the spurious check and forged the name of the payee and cashed it. Who is liable and why? (187 N. M. Rep. 516.)

No. 106

Stearns was the holder of a note executed by Bolles, payable to "John P. Reed, or order," and indorsed "Joseph P. Reed." There was, when the note was given, a person living in the same town whose name was "John P. Reed," but it was proved that the note was in fact given by Bolles to Joseph P. Reed for money lent him by the latter, and that it was indorsed by Joseph P. Reed to Stearns. Was this a valid indorsement? (11 Cush. [Mass.] 320.)

Chapter XX

DEFENSES: PRESENTMENT

Keep in mind these questions when studying this chapter:

1. **How does a real defense differ from a personal defense?**
2. **What are the duties of a holder at maturity of the instrument?**
3. **How are indorsers discharged from their liability?**
4. **What is a good presentment?**
5. **When is protest necessary? Why?**

§ 96. **Real and personal defenses.**—When a negotiable instrument is due, the "holder in due course" may usually enforce the payment of it against all prior parties. On the other hand, certain defenses may be offered as an objection to its payment. The defenses interposed may be against the instrument or they may be of a personal character. They are grouped into two classes:

(1) Real defenses.
(2) Personal defenses.

(1) *Real defenses* are those that attach to the instrument itself and are good against all persons; even a holder in due course is powerless against them. The following are real defenses:

(a) *Want of capacity to make a binding contract.*—This includes the negotiable paper of infants, insane persons, and all others incompetent to make a contract.

(b) *Illegality of contract.*—If a contract is expressly made illegal by statute, it creates a real defense. Notes given in payment of wagers or gambling debts cannot be enforced where they are made void by statute.

(c) *Forgery or alteration.*—Forgery is a real defense, for the minds of the parties have not met in contract. If a material alteration has been made without authority, the innocent holder may recover from the person making the alteration

and all persons indorsing after the paper is altered; and he may recover from all prior parties to the paper as it was in its original condition.

One cannot be bound on an instrument to which his name has been forged or affixed without his authority. Where a person writes his name on a blank piece of paper and another writes a promissory note over the signature without authority, the note will not be enforceable against the person whose name is affixed thereto as maker.

Any alteration which changes the effect of the instrument in any respect is a material alteration. An alteration which changes,

(*i*) The date.
(*ii*) The sum payable, either for principal or interest.
(*iii*) The time or place of payment.
(*iv*) The number or the relation of the parties.

is a material alteration which may be set up as a defense against the payment of the instrument.

An action was brought on a note in which the maker was induced by a trick to sign, thinking it was an order for machinery. The instrument upon which the plaintiff sought to recover was the left hand part of the following paper, the right hand portion having been cut off at the vertical dotted line:

BOALSBURG, PENNA., May 2, 1913

Six months after date I promise to pay to J. H. Smith or order Two Hundred Fifty Dollars for value received, with legal interest without defalcation or stay of execution.

K. A Davis

order $50.00 when I sell by worth of Hay and Harvest Grinders appeal, and also without

Agent for Hay & Harvest Grinders.

It was held there could be no recovery upon this kind of an instrument. There was no execution and delivery of a negotiable note. To make a real defense it must be shown that the party was free from negligence in order to escape liability. (79 Pa. St. 370.)

(d) *Statute of limitations.* This is a bar to recovery which legislatures have deemed wise to set up against persons who fail to pursue their claims diligently.

(2) *Personal defenses* are such as fraud, duress, want of consideration, payment.

These are defenses that grow out of the acts of the immediate parties; they are not good against a holder in due course.

Crosswhite gave his check to a thief in payment of mules that had been stolen. The thief used the check to pay a merchant for clothing purchased. The maker of the check gave notice to the bank to stop payment. The merchant sued the maker of the check. The latter set up as a defense that the check had erroneously been given in payment of stolen property. The court held that the merchant was a holder in due course, and that the maker was liable for its payment. (124 Mo. 34.)

§ 97. **Necessity of presentment.**—The holder of a negotiable instrument can hold it as long as he likes without losing his claim against the maker of a note or the acceptor of a bill of exchange, provided always that the time does not exceed the statute of limitations. The maker or acceptor promises unconditionally to pay, and not merely to pay if another does not. Presentment is necessary to bind the drawer and indorsers, otherwise they will be discharged from liability.

§ 98. **Day for presentment.**—Presentment must be made on the day the instrument falls due. Instruments falling due on Sunday or a holiday are to be presented for payment on the next succeeding business day. The presentment should be made at a reasonable hour, unless there are circumstances that would justify making it at a later hour.

If the instrument is payable January 31, presentment must be made on that day. An instrument dated January 31 payable one month after date must be presented on the last day of February.

Calendar months are meant when an instrument is payable so many months after date. A note for one month dated January 31 is due February 28 or 29, as the case may be. In computing time, if the time is given in days, the actual time is considered. Where days are expressed, Sundays and holidays are included. The day of date is excluded, but the whole of the last day is included. Hence, a note dated January 31, payable in thirty days, is due March 2 in ordinary years.

§ 99. **Place of presentment.**—A negotiable instrument may designate the place of payment either by expressly making it payable at a particular place, or by the maker or acceptor adding an address to his signature. When a place is specified, it must be presented there. If no place is specified and no

address is given, it must be presented at the usual place of business or residence of the person who is to make payment. If no such place can be found, it may be wherever he can be found, or at his last known place of business or residence.

An instrument payable at the "Union National Bank" must be presented at the bank: at "114 South Main Street, St. Louis," must be at the place named. A presentment not made at the place specified for payment is of no legal effect. If the instrument is payable at a bank and it has been deposited by the holder so as to be there on the date of maturity, the presentment is complete.

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make the payment has no funds there to meet it at any time during the day, in which case any hour before the bank closes on that day is sufficient.

§ 100. **Parties to presentment.**—Presentment should be made by the holder, or by his lawful agent. Upon the death of the holder, it should be presented by the holder's administrator or executor. The instrument must be exhibited to the person from whom payment is demanded, and when paid, it must be delivered to the person paying it.

Presentment of a note is made to the maker, and in case of a bill to the drawee or acceptor. In the event of the death of such persons, it would be presented to their personal representative, if one has been appointed. When the instrument is made or accepted by two or more persons jointly, the demand should be made on both or all of them unless they are partners, when one is sufficient.

§ 101. **Protest.**—It is necessary for holders of negotiable instruments to give notice of dishonor in order to prevent the release of indorsers of promissory notes, and drawers and indorsers of bills of exchange and checks, if they are not paid. This notice of dishonor must sometimes be in the form of a protest. The parties liable as drawers or indorsers are released if the instrument is not protested when protest is required.

A protest is a formal declaration, made in writing, by a notary public (a public officer authorized to administer oaths, note protests, and to take acknowledgments of deeds and other instruments) on behalf of the holder of a bill of exchange or note, attesting that it has been presented for acceptance or

payment and that it was refused. A protest under a notary's signature and seal is received everywhere as legally authenticated without other evidence; hence the notary must make the presentment and demand, that he may have the evidence of the dishonor. After presenting the paper, he notes thereon the fact that on that date payment was demanded and refused, writing across the face of the instrument:

"Protested by me for non-payment (or non-acceptance) this 1st day of April, 1928. John Jones, Notary Public."

Protest must be made in the case of foreign bills of exchange, but it may be made of any other negotiable instrument. It is now the custom of banks and many business houses to protest all negotiable instruments, unless protest is waived, or the amount involved is trifling.

§ 102. **Certificate of protest.**—When a protest has been made the notary prepares a certificate, under his hand and seal, to which must be attached the instrument protested or a copy of it. This certificate (illustrated on page 164) must specify:

(1) The time and place of presentment.

(2) The fact and manner of presentment.

(3) The demand made and the answer given, or the fact that the drawee, acceptor, or maker could not be found.

(4) The cause or reason for protesting the instrument.

§ 103. **Notice of protest.**—After the certificate of protest is made, notice of it must be mailed to each of the indorsers. The notice must be sent not later than the day following the dishonor. No particular form of notice is required. It will be sufficient if it conveys information that will acquaint the party of the demand and non-payment of the particular instrument.

When a negotiable instrument has been presented to the acceptor for payment and payment has been refused, notice should be given to the drawer and to each indorser. The drawer or indorser to whom such notice is not given is discharged from liability, unless he has previously waived notice.

CERTIFICATE OF PROTEST

PROTEST, with copy of protested instrument. The W. H. Anderson Co., Law Booksellers and Law Stationers, Cincinnati, Ohio

Copy of Protested Instrument, and of its Indorsements (Words erased and supplied as the facts required.)

$ 15.00 DAYTON, WASH., Sept. 11, 19

~~after~~ ~~promise to~~

pay to the order of J. A. WHITNEY & CO.

Fifteen - 00/100 Dollars,

~~negotiable~~

Value received, and charge the same to the account of

To AMERICAN NATIONAL BANK, DAYTON, WASH.

STUBBLEFIELD & STEWART
By S. C. Stewart

Indorsements: Pay to Merchants National Bank for deposit, J. A. Whitney & Co., Cincinnati, Ohio. - Pay to the order of any bank or banker, Merchants National Bank. All prior endorsements guaranteed.

United States of America, State of Washington, County of Columbia, ss.

Be it Known by this Instrument of Protest, That at the close of banking[1] hours on the fifteenth day of September A. D. 19 I, C. P. Dunbar a NOTARY PUBLIC within and for said County of Columbia, DIC. at the request of the American National Bank holder of the original check hereto attached and copied above, PRESENT the same to the American National Bank and DEMANDED PAYMENT[2] thereof, which was REFUSED, for the following assigned reason:

NOT SUFFICIENT FUNDS

I then PROTESTED the same for non-payment[2] and NOTIFIED the following named drawer and indorser thereof of said presentment and protest, by a separate notice to each, enclosed in[3] separate envelope[3] and address as follows: Stubblefield & Stewart, Dayton, Wash., J. A. Whitney & Co., Cincinnati, Ohio, and Merchants National Bank, Cincinnati, Ohio.

and deposited the same in the post office of Dayton, Wash. in said county, the same day, postage paid; and the following-named drawer and indorser thereof, by delivering to each of them such notice personally on the same[4] day:

Whereupon, I, the said notary, upon the authority aforesaid, have PROTESTED, and do hereby solemnly PROTEST, as well against the drawer of the said check as against all other persons whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages and interest, suffered, or to be suffered, for the want of payment[2] thereof, and I certify that I have no interest in the above protested instrument.

Witness my hand and notarial seal this fifteenth day September 19

Seal. Protest No. 2891
Protest Fees, $1.62

C. P. Dunbar, Notary Public

1 Or business, or otherwise, state when, as may be. 2. Or acceptance, if so. 3. Or separate, as may be. 4. Or next, as may be. See Am. [illegible] 70 O. L. a. 31.

(1) *By whom given.*—The holder of the paper is the proper person to give the notice, or it may be given by his agent or any person who might be compelled to pay the debt. It should be presented by a notary public who is employed to give the notice and who is to present the instrument whenever it is intended to protest it.

(2) *How given.*—The notice may be written or oral. If written, it need not be signed, and it may be supplemented with an oral communication. It may be given personally or by delivering it through the mails. When the notice is properly addressed, stamped, and deposited in the mail, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

The following is a form of notice:

Notice of Protest

DAYTON, WASH., Sept. 15, 19__

To J. A. Whitney & Co.,

Tacoma, Wash.

TAKE NOTICE That a check for $ 15.00

drawn by Stubblefield & Stewart

upon American National Bank

in favor of J. A. Whitney & Co.,

or order, dated September 11, 1928, payable

at

having been this day presented for payment and refused, was PROTESTED by me for non-payment.

At the request of the holder of said check I hereby notify you that they will look to you for payment of the same, together with damages, interest and costs accruing thereon, you being payee thereof.

Respectfully,

C. P. Dunbar

Notary Public

QUESTIONS FOR DISCUSSION
(Oral)

1. "Whenever a bank cashes a forged check, it must stand the loss." Does this rule apply to the following problem?

Adams takes a forged check from Brown. It goes from Adams to Clark; from Clark to Dunn. Dunn presents it to the bank where it is paid. The one guilty of forging the check cannot be found.

2. John Doe gave his $40 note for five quarts of holiday "moonshine" whisky. When due he refuses to pay. What recourse has the holder?

3. Robert, eighteen years old, has fallen heir to the $10,000 estate of his uncle. He was approached by a stock-salesman who took Robert's note for $10,000 in payment of oil stock sold him. After passing through the hands of several bank presidents the note reaches you. Robert refuses to pay. Should he be protected; if so, state why? What recourse have you? Explain the procedure you would follow.

4. The holder of a note, which you indorsed, called on the maker on the date of maturity. The maker refuses to pay and the holder mailed you a letter in which he informed you of the refusal. This letter was lost in the mail. Can you be held?

5. "Demand, refusal, and notice are required to charge an indorser." Would it be fair to apply this rule where the name of the maker is forged? (97 Fed. 181.)

6. "Protest" may mean (a) to dissent, (b) to assert earnestly, (c) to testify before. Which meaning does it take in this chapter?

7. Give the statute of limitations as it applies to notes in your state. What is the purpose of this statute?

8. "Presentment must be made on the day the instrument falls due, and where a place is specified it must be presented at that place." At what disadvantage would the indorsers find themselves, if there were no such requirements?

9. Why should a note be made payable at a particular place?

10. M. S. Wise gave a note in payment of a radio. He paid the note before maturity receiving a receipt for the money paid but did not receive the note. In the meantime the Radio Company disposed of the note to a holder in due course. The note is now due and the present holder demands payment. Will Mr. Wise be obliged to pay the note a second time? What defense, if any, does he have?

CASE PROBLEMS
(Written or Oral)

No. 107

A blind man signed a note which was misread to him as a receipt. He had no reason to doubt the genuineness of the paper he was signing. Would he be held liable for payment to anyone? (83 Fed. Rep. 437.)

No. 108

The proprietor of a drug store gave a written order to an advertising company for a piano, and other items. Attached to the order was the druggist's promissory note payable to the advertising company, or order, for $400. The note and order were on the same sheet of paper, but were separated by a perforated line. The note was detached from the order and sold. The purchaser alleged he was an innocent purchaser for value and before maturity. Was this such a material alteration as to preclude the holder's claim as an innocent purchaser?

No. 109

Plaintiff gave a check in payment of a gambling debt, but the next morning, an hour before the opening time of the bank, he sent notice to the cashier of the bank not to pay the check. An hour after the bank opened the holder of the check presented it for payment to the cashier. Upon whom did the loss fall? Why?

No. 110

Smith made a negotiable promissory note payable to bearer. Before maturity B stole the note and immediately transferred it to Clark for value, who had no notice of its theft. Is Smith liable to Clark on the note? (54 Ill. 296.)

No. 111

A note payable four months after date at 139 Fifth Avenue, New York, was indorsed as follows: Stone & Kimball; George B. Williams; University Press.

The note was not paid at maturity, and was protested. The address of Williams was not on the note and the notary mailed a notice to Williams at New York, his last known address. Williams lived in Washington and failed to receive the notice. Was he properly notified?

No. 112

A bet or wager under the laws of Kentucky is "vicious, illegal, and void." A note was given for money lost on a wager, and is now held by an innocent purchaser for value and without notice of the illegal consideration. May the holder collect from the maker? (123 Ky. 677.)

No. 113

"I beg to inform you that your acceptance for $200 due today, drawn by J. Hunt, is not paid. Please have the goodness to hand me a check for the same, with noting expenses, $3 per return. J. Jones."

Does this constitute sufficient notice? (94 N. Y. Supp. 1007.)

No. 114

A bill drawn in Ohio and payable in Pennsylvania was dishonored when presented for payment. Is a protest necessary? (2 Peters [U. S. Sup. Ct.] 586.)

Photo from Painting by Harris & Ewing, Washington, D. C.

LORD BACON

PHILOSOPHER AND LAW REFORMER

[OVER]

FRANCIS BACON

Francis Bacon, Baron Verulam, Viscount of St. Albans, born 1561 and died 1626. He was a celebrated English Philosopher and Statesmen, and one of the most remarkable men of whom any age can boast. He was made solicitor-general and then attorney-general. In 1617 he became Lord Keeper of the Great Seal, and in 1618 was made Lord Chancellor. He was accused before the House of Lords of having received money for grants of offices and privileges under the seal of state, and, being unable to justify himself, he pleaded guilty and was sentenced to pay a fine of £40,000 and to be imprisoned in the Tower during the pleasure of the King.

Bacon wrote for the future. His *Essays* and *The Advancement of Learning* are read wherever the English language is known. He is said to have "moved the intellects which have moved the world."

Chapter XXI

GUARANTY AND SURETYSHIP

He that is surety for a stranger shall smart for it: and he that hateth suretyship is sure. Proverbs xi, 15.

Keep in mind these questions when studying this chapter:

1. Is there a distinction between guaranty and suretyship?
2. How many parties are there to a contract of guaranty or suretyship?
3. What are the special duties of the several parties?
4. Does a guarantor or surety have any special rights?
5. In what ways may the contract of surety be terminated?

§ 104. **Nature of the subject.**—Guaranty and suretyship relate to promises made by one party to answer to another for the debt, default, or obligation of a third party. Some features of the subject were discussed in the chapter dealing with the second clause of the fourth section of the Statutes of Frauds. It also has to do with those who become surety for the payment of commercial paper, or who guarantee payment of the same.

A contract of guaranty may be an agreement in the nature of a promise to be held responsible for an extension of credit to another, or it may be in the form of an undertaking of some special obligation, written on the back of another contract. The contract of a surety is where a party usually signs a bond or note along with another and thereby agrees to become responsible for the performance of the original undertaking. In either case a financial risk is incurred, and usually without receiving any benefits in return.

§ 105. **Definition.**—Guaranty or suretyship is a contract whereby one person engages to become responsible to another for the payment of some debt, or the performance of some duty, by a third person.

The words *guaranty* and *surety* are often used inter-

changeably, signifying the same thing. These terms are similar in many respects—the guarantor and surety are each bound for another person; they differ in that the surety is bound upon the original undertaking or contract while the guarantor's promise is a collateral agreement. In other words, the surety promises with another party to do an act; a guarantor promises that another will do it.

Collateral, as used in the foregoing definition, refers to that which is in addition to but not strictly a part of the main thing under consideration.

It has been said that "A surety undertakes to pay if the debtor does not, while a guarantor undertakes to pay if the debtor cannot." The one is an insurer of the performance of the contract, the other is an insurer of the debtor's insolvency.

The words *warranty* and *guaranty* were originally synonymous terms, but they are now used in a somewhat different sense. Warranty expresses the responsibility of the person doing the act, guaranty the responsibility of some other person on his behalf.

§ 106. **Contract of guaranty.**—Guaranty and suretyship are founded upon a contract, and all the essential elements necessary for the formation of a valid agreement must be present. The contract must be in writing. This is necessary in order to comply with the Statute of Frauds, which provides that the promise to answer for the debt, default, or obligation of another, to be enforceable, must be in writing and be signed by the party to be charged, or his authorized agent. No special form of words or phraseology is required; any writing that will embody the terms of the agreement between the parties will be sufficient.

"I hereby guarantee the payment of the within note, without protest. Richard Roe," was held to be sufficient to constitute a contract of guaranty.

"For a consideration I hereby agree to become security for the faithful performance," etc., was held to be a contract of surety.

§ 107. **Parties.**—There are at least three parties to every contract of guaranty or suretyship. *First*, the one who gives the promise or guarantee, and who is called the *guarantor* or *surety; second*, the party whose payment or performance is secured or guaranteed is termed the *principal debtor*, or

simply the *principal;* and *third,* the party to whom it is given, termed the *creditor.* Any person competent to contract may become a guarantor or surety.

§ 108. **Consideration.**—Every contract of guaranty and of suretyship must have a consideration to support it—but the law will not inquire into its adequacy. The consideration may consist either of some right, interest, or benefit to the principal or guarantor; or some loss, detriment, or responsibility suffered by the creditor. It must not be a past consideration, therefore, if executed before the contract were made it would not be sufficient to sustain the contract.

"I hereby guarantee the payment for any goods which Richard Roe delivers to John Doe. (Signed) F. O. Greene." The delivery of the goods to John Doe is the consideration for the promise.

If the goods had been already sold and delivered to Doe, then in order to hold Greene responsible on his guaranty a new consideration would be necessary. Or, if Richard Roe should agree to extend the time of payment after the goods had been delivered on the strength of this promise, there would be a sufficient consideration.

§ 109. **Kinds of guaranties.**—Guaranties may be classified as either:

(1) General guaranties.
(2) Special guaranties.

They are sometimes further distinguished as: (a) *limited,* (b) *continuing.*

(1) *A general guaranty* is one that is not addressed to any particular person or firm, but is open for acceptance by the public generally. Anyone to whom it is presented may act upon and enforce it the same as though he had been specifically named. The following letter of credit is a general guaranty:

> As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make under this letter of credit, not exceeding fifteen hundred dollars.
>
> (Signed) John Doe.

(2) *A special guaranty* is one addressed to a specific individual or firm. The privilege of accepting such a guaranty is confined to the person to whom addressed—and none other. The following is deemed to be a special guaranty:

> Messrs. Bingham Brothers & Company,
> Dayton, Ohio.
> Gentlemen: Any draft that you may draw on Richard Roe of our city we guarantee to be paid at maturity.
> (Signed) Boson, Burns & Co.

(a) *A limited guaranty* is one confined to a single or a definite number of transactions, or is limited to a specified date.

(b) *A continuing guaranty* embraces successive dealings not limited as to time, and remains as standing security until it is withdrawn, either by the act of the parties or by the death of the guarantor.

§ 110. **The guarantor.**—The guarantor is the person who gives the guaranty. It is he who is bound to the creditor upon a separate contract from that of his principal—and not in a joint undertaking to do the thing. He promises to answer only for the consequence of the default of the principal. Hence, the liability and responsibility of a guarantor is less than that of a surety.

§ 111. **Notice.**—The guarantor is not obliged to take notice of the non-performance of the original contract of the principal. The creditor must give such notice. This is particularly true if there is a provision that the guarantor is to receive notice. A failure of the creditor to give notice may release the guarantor to the amount of damages he may sustain by reason of not having received the notice.

§ 112. **Diligence.**—The creditor must exercise diligence in an effort to collect payment from the principal. What is reasonable diligence will depend upon the circumstances of each particular transaction—it might require a jury to settle the question, there is no inflexible rule. The conditions of the

guaranty must be strictly followed; the guarantor can be held only for the amount agreed upon, if there is a time limit mentioned it must be observed.

§ 113. **The surety.**—A person who contracts jointly with the debtor (the principal) is deemed a surety. He is bound with his principal as an original promisor, by an instrument usually executed at the same time, and on the same considerations. But one who enters into such a contract should write the word *surety* immediately after his name, to indicate that he is not a co-maker.

The obligation of the surety to see that the debt is paid is absolute, and not conditional upon the failure or inability of the principal. He is obliged to do what the principal has contracted to do—unless by the terms of the agreement his responsibility is limited. And the liability will continue indefinitely unless there is a fixed or implied time when it is to cease.

One may become bound as surety for another in a bond, bill, or note for the payment of money, the delivery of property, or the performance of any other kind of a contract. The following is an example of a note signed by a surety.

> $500.00. Boston, Mass., July 21, 1927.
> Thirty days after date I promise to pay to the order of Richard Roe Five Hundred Dollars. Value received.
> *Peter Sterling.*
> *Samuel S. Smith,* Surety.

§ 114. **Notice.**—The creditor is not required to give the surety notice of the non-payment of the debt. The latter is held to know of the default of his principal. Nor need the creditor display any diligence in an effort to collect from the debtor before proceeding against the surety, but he may proceed against him at once for the payment. It will be readily seen that the responsibility of a surety is much greater than that of a guarantor.

§ 115. **Rights of guarantor and surety.**—A person who becomes responsible, as a guarantor, for another under a con-

tract of guaranty has certain rights against the principal, the person for whom the guarantee is given, and also against those who may be co-guarantors in respect to the same obligation. These rights are:

(1) Indemnity.
(2) Subrogation.
(3) Contribution.

(1) *Indemnity.*—Upon the maturity of the debt or obligation, the guarantor may pay it at once. He may do this to avoid costs and interest. If he has made such a payment, the guarantor may recover from the principal whatever he may have paid on account of the latter's default. This will include the payment of the debt and reasonable costs. Whenever a guarantor has paid any part of a guaranteed debt, he then becomes a creditor for the amount so paid and may compel repayment of that amount.

(2) *Subrogation.*—The moment a guarantor pays the debt of the principal, the creditor must transfer to the former any property or securities he may hold for the principal. The guarantor then stands in the place of the former creditor. This substitution of one person for another is called *subrogation* and gives to the substitute all the rights of the person for whom he is substituted.

Roe borrowed money of Brown. Roe gave Brown a mortgage on his stock of goods. Smith guaranteed the debt. When the mortgage fell due Smith paid the debt to Brown. Smith was then entitled to the mortgage Brown held as security against Roe. But Smith did not have this right until he had paid the debt for which he was also held liable.

(3) *Contribution.*—When two or more persons are jointly bound for the principal they are co-guarantors. If one of the guarantors pays the debt or obligation he may compel the other guarantor or guarantors to reimburse him for their *pro rata* share. This is called *contribution.*

Brown, Smith and Jones guaranteed Black's debt of $300 to Edwards. Brown paid the entire debt when it was due. He was then entitled to $100 from Smith and $100 from Jones and may sue to recover it. But if he paid only his share ($100), he could not recover from either Smith or Jones. If Brown compromised the debt with Edwards and settled for $150, he could recover $50 from each of the co-guarantors.

§ 116. **How extinguished.**—One of the minor differences between a guarantor and a surety is that in case of default the guarantor is usually entitled to a notice of the default, while the surety is not. Hence, with the exception of notice, any act which will discharge a guarantor from his liability will also release a surety from his obligation. This discharge may be accomplished in various ways, the most important of which are:

(1) Payment of the debt.
(2) Extension of time.
(3) Alterations.
(4) Fraud.
(5) Loss or surrender of securities.

(1) *Payment.*—The payment of the debt or the performance of the obligation by the principal will release the guarantor. Likewise, if the principal and his creditor effect a settlement and the latter accepts a less amount than the debt, but in full satisfaction of it, this compromise will also extinguish the liability of the guarantor.

Long effects a settlement with his creditor, Peterson, by which Peterson accepts sixty cents on the dollar in full satisfaction of the debt. Cook, the guarantor of Long's debt was thereby released from his obligation.

(2) *Extension of time.*—An agreement between the principal and the creditor to extend the time of payment or performance releases the guarantor. But this extension must be made (a) for a consideration, (b) a definite time, and (c) without the consent of the guarantor.

A mere delay in enforcing collection or performance, or other leniency shown is not considered an extension of time. On the other hand, an agreement between the guarantor and the creditor for an extension of time to the former or even releasing him entirely does not discharge the principal from his liability.

The guarantor has a right, when the debt is due, to pay it, and is entitled to the securities in the hands of the creditor. An extension of time, without the guarantor's consent, would deprive him of this right.

Richard Roe was surety on a note. On the day the note was due the holder indorsed upon it, "Time extended six months, interest paid in

advance." This was an extension of time and released Roe as surety for the payment.

(3) *Alterations.*—If the principal and creditor materially alter the terms of the contract after its execution, it will have the effect of releasing the guarantor from his liability, unless, of course, he consents to the change. This alteration may consist in varying the terms of the contract, in taking new security from the principal in lieu of the original, in extending time of payment, or in the creditor's releasing the principal from his liability.

Smith gave Brown a note. Jones signed the note as surety. There was an agreement betwen Smith and Brown that the note was to bear interest, but it was not written in the note at the time Jones signed it. Interest was afterwards written in the note to conform to the agreement, but without the consent of Jones, and he was released from his liability. An apparently insignificant change may result in a serious loss.

(4) *Fraud.*—If fraud is practiced by the creditor upon the guarantor, or if perpetrated by the principal with the knowledge and consent of the creditor, the guarantor will be discharged from his responsibility. If the principal is a defaulter, and that fact is known, but not disclosed, the concealment of the information is a fraud upon the guarantor.

(5) *Securities.*—The payment of the debt by the guarantor entitles him to the securities deposited by the principal with the creditor. It is, therefore, the duty of the creditor to protect the guarantor. If securities belonging to the principal, placed with the creditor as additional protection for the payment of the debt are lost, on account of the negligence or want of diligence on the part of the creditor, the guarantor will be released to the extent of the injury sustained by such loss.

Likewise, if the creditor has securities or a lien on the property of the principal, he must not relinquish the lien or surrender the securities except upon the payment of the debt. To the extent that the creditor destroys the value of the lien or securities, to that extent will the liability of the guarantor be extinguished.

§ 117. **Surety companies.**—There are now corporations known as surety or bonding companies who furnish bonds for public officials and private individuals whom they consider

desirable risks. These companies, for a consideration payable annually, called a premium, become security for the debt or obligation of the person bonded. The companies doing this kind of business require an application blank to be filled, giving the names of various references and other information relating to the record and history of the applicant, with a view to determine his desirability as a risk.

QUESTIONS FOR DISCUSSION
(Oral)

1. Why should the words "surety" and "guarantor" not be used interchangeably?

2. Hills encourages Dodge to buy certain property from Boon. As an inducement Hills guarantees that if Dodge resells the property within three years, the property will bring $1,000 more than Dodge paid for it. Is this a guaranty?

3. Distinguish between these promises:
   (a) "If you will let Bard have the furniture, I will pay for it."
   (b) "Please give Bard the furniture. I will pay, if he does not."

4. "Guarantees may be classified as general or special; limited or continuing." Discuss when it might be important to know whether a certain contract of guaranty comes under one of these different classifications.

5. A learned judge once said, "A guarantor, like a surety, is a favorite of the law, and he is not held unless an intention to bind himself is clearly manifested, and his liability is never to extend beyond the precise terms of his obligation." What did the judge mean?

6. Why should one ever hesitate about becoming either a surety or guarantor for another?

7. Porter, an infant, entered into a contract with Spring. Winter, an adult, became surety for Porter. Porter then failed to perform his part of the agreement. Does this refusal of

Porter to carry out his contract release Winter from his liability?

8. Plaintiff sold defendant $1,000 worth of merchandise on January 1. Terms: $500 February 1; $500 March 1. On the first of February defendant becomes insolvent. You are now prevailed upon to guarantee the payment of defendant's debt. You do so in writing. What is the extent of your liability?

9. (a) On the maturity of Baker's debt to Carpenter, the guarantor, York, immediately paid one-half of the debt. What are the rights of the guarantor against Baker?

(b) If you were a creditor, would you give the guarantor or surety notice of the principal's non-performance? Why? Is it a legal or moral requirement?

10. How is the guarantor's liability affected by the relinquishment or loss of collateral given to the creditor by the principal? Reason? What is the general meaning of the term collateral?

CASE PROBLEMS
(Written or Oral)

No. 115

Snyder wrote on the back of a note "I hereby guarantee the payment of this note, A. C. Snyder." Is this a guaranty?

No. 116

Browning executes a note in favor of Smith, and Richard Roe indorses it. Would it make any difference whether Roe signed the note at the time it was made or later. (42 N. Y. 22.)

No. 117

Hamlet said to a merchant: "Let Black have the goods he wishes to purchase, and if Black does not pay for them, I will." Acting on this promise the merchant furnished Black goods and charged them to Black. Black refused to pay the amount or any part of it. The merchant thereupon sued Hamlet for the amount of the bill. Can he recover? Give reasons for answer. (1 Lord Raymond 224.)

No. 118

A father agreed verbally to become responsible for a suit of clothes delivered to his minor son by a merchant. Is this promise binding upon the father?

No. 119

Richard is surety on John's lease. Under the terms of the lease the tenant remains in possession for another year. Is the surety held for another year also? (45 N. Y. 691.)

No. 120

X borrowed $600 and gave his promissory note with Lane, Blank, and King as sureties. When the note became due the payee brought suit gainst Lane, one of his sureties, and collected the whole debt from him. What rights and remedies does Lane have? (20 Am. Dec. 559.)

No. 121

Adam Bede was surety upon a note for C. P. Black. After the note became due, the maker of the note called at the bank where it was payable and procured an extension of payment for thirty days. How does the extension operate so as to affect the surety? Upon default at the expiration of the time, the bank brought suit against both Bede, the surety; and Black, the maker. Can it recover against either of them? (14 Ohio 372.)

No. 122

When the debt was due, the creditor agreed to forebear the collection for sixty days, Jackson then agreed to act as surety. Is Jackson bound?

No. 123

Doe has guaranteed the payment of Roe's debt of $600 to Sharpe. Roe died. His debt became due. If his estate does not pay the obligation is Doe liable? (167 Iowa 627.)

No. 124

An alteration was made in a guaranty after its delivery whereby "we guarantee" was changed to read, "I guarantee." Is the guarantor discharged because of this alteration? (70 Ind. 271.)

Chapter XXII

SALES OF PERSONAL PROPERTY

Formation of the Contract

Keep in mind these questions when studying this chapter:

1. **In a general sense, what is personal property?**
2. **What is the difference between a contract to sell and a contract of sale?**
3. **In what respect do the essentials of a contract apply to a sale?**
4. **What is a "bill of sale," and its distinctive purpose?**

§ 118. **Uniform Sales Act.**[1]—A uniform statute on the principles of law as applied to the sales of personal property, prepared by a commission, for the purpose of codifying and bringing about a uniformity of laws in the United States, has been adopted by the legislatures in a number of states. It is more than likely that all of the states will enact this statute shortly. The subject will here be considered and treated in accordance with many of the rules of the foregoing act, with such other explanations and illustrations as may be necessary.

Definition.—(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

The word sale is used in two senses:

(a) It may mean a present transfer of the ownership of property (the title) in goods to the buyer for a price in money. It is often called an executed contract of sale, which is a completed sale.

[1] At the present time the following territory and states have adopted the Uniform Sales Act: Alaska, Arizona, Connecticut, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

Mr. Lamar said to Mr. White, "You may have my car for $500." White answers, "I accept your offer," and paid the amount named. This is a sale, and is distinguished from a contract to sell. It is an executed sale, the sale itself has been completed.

(b) It is also used to designate that the property in goods is to be transferred to another at some future time. This is a contract to sell and is said to be executory.

Lamar offers to sell White his car for $500 as soon as he has finished repainting it. White accepts the offer. This is merely a contract to sell; it is not the sale itself. It is an executory sale, since the sale is yet to be executed.

An executory contract of sale is not a sale but merely an agreement to sell. It transfers no interest in the property which is the subject of the sale, but it does give the buyer a right against the other party. It may be said that "a contract to sell is no more a sale than a contract to marry is a marriage." If, according to the terms of the agreement, the transfer of the property is to take place at a future date, it is a contract to sell; but if the transfer takes place at the time of the transaction, it is a sale.

These distinctions are for the purpose of determining upon whom the loss falls if the goods are destroyed or injured. In the first instance, the ownership passes to the buyer, although the seller has possession. If a loss occurs without fault of the seller it will be the buyer's loss. In the second instance, there is a contract to sell and the ownership does not pass until the conditions of the agreement have been fulfilled. Hence, if a loss occurs, it will fall upon the seller.

The plaintiff bought a wagon from a farmer, paid the agreed price, and said he would call for it on the following day. Before the plaintiff called, the wagon was destroyed by fire through no fault of the farmer. The loss was the plaintiff's. The ownership passed to him when the sale was made.

A merchant made an agreement with a farmer whereby the latter was to deliver at the merchant's place of business a wagonload of apples at an agreed price per bushel. The apples were destroyed by a frost before the title had passed, and the loss fell on the farmer. This was a contract to make a sale, and the ownership of the apples would not pass to the merchant until they were delivered.

§ 119. **Necessary elements.**—To be a valid sale there must be present all the elementary principles of a contract, as:

(1) Parties competent to contract—the seller and the buyer, legally called the vendor and vendee.

(2) Agreement that the title to the thing is to be transferred to the buyer.

(3) The subject-matter, the title to which is in the seller.

(4) The consideration — payment, or the agreement for the payment — of the price in money.

(5) The agreement must result in a legal sale.

(1) *The parties.* — Capacity to buy and sell is regulated by the general laws concerning capacity to contract. Where necessaries are sold and delivered to a minor or a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor.

(2) *Mutual assent.* — There must be a mutual assent to all the terms and conditions of the sale; there must be an apparent "meeting of the minds," and without fraud, duress, or undue influence. What has been said concerning offer and acceptance equally applies to a sale of personal property.

(3) *Subject-matter of a sale.* — The goods which form the subject of a sale may be either existing goods, owned or possessed by the seller, or goods to be acquired or manufactured by the seller after making the contract to sell. Merchants and traders often make contracts for the sale of personal property which is not theirs at the time.

There can be no sale of a thing that does not have an actual or potential existence. Those "things which are the natural product or expected increase of something already belonging to the vendor" are said to have a potential existence. They may be the subject of a sale.

The wool from a flock of the seller's sheep, even before it grows, the future crop from lands, or unearned wages from an existing contract, may be the subject of a present sale. It must not be wool from sheep or a crop from land one intends to buy, or a contract for wages one may make. The property is vested in the buyer the moment it comes into existence, and a second buyer would not acquire title if an attempt were made to sell it to him.

The term *goods* includes personal property, as a wagon, a

barrel of apples, a sewing machine, a patent or copyright, and growing crops attached to or forming part of the land which require yearly planting and cultivation. Crops growing spontaneously, or without annual planting and cultivation, such as trees or grass, are considered as real property until they are severed from the land or are harvested.

(4) *The consideration,* called the price.—The payment of a money consideration or price or an agreement, express or implied, therefore, is necessary to a sale of goods. There can be no sale without a price. If goods are delivered without the intention of receiving something in return, the transaction is considered a gift. In a gift there must be an actual delivery to pass title, but there may be a sale without delivery. An exchange of goods, or commodities for other goods, labor or the like, is called barter.

The price need not necessarily mean that payment must be made in money. It must be money or money's worth. Payment may be made in any kind of personal property. If credit is not given, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts. Hence, the seller need not deliver without payment, and if the payment be not made at once, there is no sale, but merely a bargaining. However, if the seller does accept the credit of the buyer, the thing sold immediately becomes the property of the buyer.

The price may be fixed by the contract, but this is not necessary. When property is sold without fixing the price, it is inferred that the buyer must pay a reasonable price. A reasonable price is a question of fact dependent on the circumstances of each particular case. Generally it is the market price.

Marks bought of Bowser & Co. an oil tank for $45. Two years later he ordered another tank, but said nothing about the price. The price had been advanced to $55, at which price they had been regularly selling, but Marks did not know of this advance. The tank was shipped and a statement was mailed showing the price $55. Marks refused to receive the goods and the plaintiff brought suit. The buyer's failing to mention a price, implied he intended to pay what it was reasonably worth—the current selling price at the time of purchasing. (32 L. R. A. 429.)

(5) *Legal Sale.*—An agreement to sell must not contemplate an illegal sale. At common law, such agreement is illegal when the object to be sold is in itself contrary to good morals.

Likewise, when the object to be sold is innocent, but the buyer intends to use it for some unlawful purpose. There are statutes in every state prohibiting sales of a particular kind. To illustrate, the sale of firearms may be prohibited. Sales on certain days may be prohibited, as sales made on Sunday or a legal holiday. In some cases sales may be illegal because the statute requires the vendor to have a license to engage in a certain kind of business. Finally, sales may be unlawful due to a provision found in the Federal or the State Constitution, as for example in the case of the Eighteenth Amendment to the Constitution of the United States.

§ 120. **Required form.**—The contract may be made in writing (either with or without a seal), or by word of mouth, or partly in writing and partly by word of mouth, or it may be inferred from the conduct of the parties. If the sale is affected by the Statute of Frauds, then it must comply with the provisions of that law so far as the writing is concerned.

§ 121. **Bill of sale.**—A formal written contract of sale whereby the seller transfers to the buyer specified goods, and usually includes a warranty of title, is called a *bill of sale*. It is valuable as evidence of what has been done. Such a document is particularly desirable when there has not been a physical delivery of the goods. A bill of sale transfers the title of the property. If for any reason the property is to remain in possession of the former owner, the bill of sale should be recorded. A bill of sale may be in the following short form:

> Columbus, Ohio, August 1, 1927
>
> In consideration of Two hundred and fifteen dollars, to me in hand paid, I have this day sold and delivered to Samuel Stewart one Ford Touring car, 1926 model; and one shot gun.
>
> (Signed) *B. B. Browning.*

A more complete form with warranties may be as follows:

BILL OF SALE

Know all Men by these Presents,

That I, Adam Bede ....Pittsburgh, Pennsylvania..... *of the first part, for and in consideration of the sum of* Two Hundred and no/100 Dollars. ..... *lawful money of the United States, to* ....me....*in hand paid, at or before the ensealing and delivery of these presents by* ....John Q. Adams..... *of the second part, the receipt whereof is hereby acknowledged* ....has....*bargained and sold, and by these presents do* .....*grant and convey unto the said party*....*of the second part,* ....his....*executors, administrators and assigns* .....One Underwood Typewriter, No. 5, Serial No. 1907004..... .....One Office Desk, Golden Oak finish..... .....One Office chair..... .....One Wilton rug, size 6x8..... ....

To have and to hold *the same unto the said party*....*of the second part,*....his....*executors, administrators and assigns forever. And*..I..*do for*.....his.....*heirs, executors and administrators, covenant and agree, to and with the said party*.....*of the second part, to warrant and defend the sale of the aforesaid*.....goods and chattels..... *hereby sold unto the said party*.....*of the second part,* ....his....*executors, administrators and assigns, against all and every person and persons whomsoever.*

In Witness Whereof, ...I....*have hereunto set*..my.. *hand*.....*and seal the*.....Tenth.....*day of*.... .....March.....*in the year one thousand nine hundred and*.....twenty-eight.....

Sealed and delivered in the presence of

Samuel Longa

Adam Bede

QUESTIONS FOR DISCUSSION
(Oral)

1. What is the meaning of the following expressions?
   (a) "I have a *property* at 917 Eckart St."
   (b) "I have a chattel mortgage on this property."
   (c) "I agree to transfer the *property* in these goods to you."

2. Label each transaction below as a contract of sale or a contract to sell:
   (a) "I will buy your radio tomorrow and pay you $100 when I call for it."
   (b) "I will take the radio and shall call for it tomorrow."

3. You have been bargaining with Higgs for the purchase of his automobile and have arrived at some sort of agreement. During the night the automobile was destroyed by fire caused by lightning. There is some dispute as to whether your agreement amounted to a contract of sale or a contract to sell. How will this question be determined?

4. (a) X agrees to transfer the property in goods.
   (b) X agrees to transfer the merchandise. Do you make any distinction between these expressions? Explain.

5. Brown says that a contract to sell transfers no property in goods to the buyer; that such a contract may, as a consequence, be disregarded by the vendee. To what extent do you agree with Brown?

6. At common law, a sale was distinguished from barter; in a sale the consideration had to be money; in a barter it would be in other goods. Does the Uniform Sales Act make this distinction?

7. Indicate which of the following constitutes a gift, barter, contract, contract of sale, contract to sell, transfer of possession and not ownership:
   (a) "I will give you a gold watch upon your graduation, June 12."

(b) "I will give you my automobile when you become of age."
(c) Jones traded his Ford sedan to Williams for a Buick touring car.
(d) "I will sell you my basket ball at the close of this season for three dollars."
(e) "Will you take my watch and keep it for me until I return from the gymnasium?"

8. Are the words "ownership," "possession," and "title" synonymous? Is it possible to have ownership and not possession of an article? Illustrate.

9. "There can be no sale of a thing which does not have an actual existence." Give an exception to this statement. Can there be a sale of butter not yet churned?

10. Under what conditions would you insist on requiring a bill of sale from the vendor?

CASE PROBLEMS
(Written or Oral)

No. 125

Moore agreed to accept and pay Thomas for a cow the latter was to deliver. The price was not agreed upon at the time but was to be determined at a later date. Is this a valid sale? What would your answer be if the price were to be fixed by a third party?

No. 126

"Payment may be made in money or in money's worth." Defendant owned a Ford automobile. He told his chauffeur that if he would find a buyer for the car he would pay him a commission of $30. The chauffeur found an opporunity to trade the car for a Chevrolet. It was a good bargain and he made the exchange. The chauffeur now demands his commission. Was this a sale, and should the defendant pay the $30?

No. 127

Wilson bought and paid for a number of grape roots.

When the roots were delivered, they were found to be dead and of no value. Wilson returned them and demanded the return of his money. Is the buyer entitled to recover, and on what grounds? (61 N. Y. 614.)

No. 128

Defendant agrees to buy, and plaintiff agrees to sell the present crop of apples now on plaintiff's trees, for a stipulated price. Defendant is to pick the apples. Upon whom will the loss fall if the apples are destroyed before they are gathered?

No. 129

If the defendant agrees to buy, and plaintiff agrees to sell his crop of apples that may grow on these trees next year at a stipulated price, would this be a valid sale? If the crop should be destroyed through no fault of either party on whom should the loss fall? (104 Pac. Rep. 432.)

No. 130

Defendant rented a piano, valued at $140, for twenty-seven months, paying $5 down and $5 monthly, with the provision that the piano should become his when final payment was made. The defendant failed to keep up the payments. Is this a sale or a lease? (50 Conn. 238.)

No. 131

Ice had formed upon water which had spread over a spot of low ground belonging to Coats, who, in an oral agreement, sold the ice to Higgins for fifty cents. Is Higgins the owner of the ice? (41 Mich. 318.)

Chapter XXIII

STATUTE OF FRAUDS AS APPLIED TO SALES

Keep in mind these questions when studying this chapter:

1. **What are the provisions of the seventeenth section of the English Statute of Frauds?**
2. **How extensively has this statute been adopted?**
3. **In what respect does the statute apply to contracts of work and labor?**
4. **What is the distinction between a receipt and acceptance?**
5. **Who must sign the note or memorandum?**

§ 122. **Contracts of sale which must be in writing.**—The seventeenth section of the English statute of frauds relates to the sale of personal property. It is substantially as follows:

No contract for the sale of goods, wares, and merchandise[1] for the price of ten pounds ($50.00) or upwards shall be allowed to be good, unless (a) the buyer shall accept part of the goods so sold and actually receive the same; or (b) give something in earnest to bind the bargain, or in part payment; or (c) that some note or memorandum in writing be made of the bargain and be signed by the parties to be charged by such contract, or their authorized agents.

The foregoing statute has not been as generally adopted by the different states of the Union as the fourth section previously discussed. (See § 35.) A few of the states have no statute corresponding to the seventeenth section. In the existing statutes there is considerable variance in respect to the price stated therein. In recent years there has been a tendency to increase the amount specified in the original statute. These various modifications make it desirable for the student to be informed concerning the statutory changes in his particular state. For essential changes note the following:

Not in force, Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Texas, Virginia, West Virginia.
Any value, Florida, Iowa.

[1] *Goods, wares, and merchandise.*—A phrase used in the Statute of Frauds, covering generally, all classes of personal property.

Minimum, $30, Arkansas, Maine, Missouri.
Minimum, $40, Vermont.
Minimum, $50, Alaska, Colorado, District of Columbia, Georgia, Indiana, Maryland, Minnesota, Mississippi, Nevada, New York, Oklahoma, Oregon, South Carolina, South Dakota, Washington, Wisconsin, Wyoming.
Minimum, $100, Connecticut, Michigan.
Minimum, $200, California, Montana.
Minimum, $500, Arizona, Idaho, Massachusetts, Nebraska, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, Tennessee, Utah.
Minimum, $2,500, Ohio.

The provisions of the Statute of Frauds apply where a number of articles, the price of each being less than the total amount specified in the statute, but the aggregate price of which exceeds that amount, are purchased under such conditions as to constitute the act a single transaction.

Contracts for the sale of bonds, shares of stock, and similar property, are now treated as goods, wares, and merchandise, within the requirements of the statute. They were not so considered under the common law.

(1) *Sales within the statute.*—Under the fourth section previously considered (see § 35) it is specifically stated that all contracts mentioned therein must be evidenced in writing to be enforceable. The present section, the seventeenth, has three exceptions, as where:

(a) The buyer actually receives and accepts the goods, or some part of them; or,

(b) The buyer gives something in earnest to bind the bargain; or,

(c) The buyer gives something in part payment.

§ 123. **Sales and contracts for work and labor.**—Since the statute applies only to "goods, wares, and merchandise," an agreement for work and service is not within the statute. The parties may, if they wish, make an oral contract for work and labor regardless of the amount involved. It is often difficult to determine whether a given contract concerning personal property is a sale, or whether it is for work and labor. This is especially true where the thing does not exist at the time, but is to be manufactured.

Prior to the adoption of the Uniform Sales Act there were three different and distinct rules in this country as to the

determination of whether a contract was for the sale of goods, or for work, labor, and materials. The Sales Act has adopted what was in effect formerly, known as the Massachusetts rule. This rule is the one now generally followed. It is referred to as the American rule.

American Rule.—Under this rule, a contract for the sale of articles (1) existing at the time of the agreement, or (2) such as the seller in the ordinary course of his business manufactures for the general market, whether on hand at the time or not, is one of sale, and the statute applies. However, (3) if manufactured by the seller for the buyer upon a special order and not for the general market, the contract is for work and labor, and is not within the statute.

Stone gave to Brooks a verbal order for carpets to the value of $948. The carpets were to be cut, fitted, sized, sewed and laid by the plaintiff. After the carpets were prepared as ordered they were never laid. Stone gave notice he did not want the carpets, and canceled the order. Brooks brought an action for damages upon the contract. Stone offered as a defense that this was a contract for the sale of goods, wares, and merchandise, that no money was paid, no goods were received, and no memorandum was signed by him.

Judgment was given to Brooks. The court said: "It was the agreement that the necessary carpets should be cut from the rolls, sized, shaped, and sewed to make a carpet of a size and shape to fit a special room or rooms. It is plain that such a carpet is not suitable for sale to others in the ordinary course of the seller's business." (59 N. E. [Mass.] 152.)

Where there was a verbal contract to buy 1,000 boxes of ordinary candles, at 21 cents a box, which Gardner was to manufacture and deliver to Joy in the ordinary course of his business, it was held that Gardner could not sue on the contract, because it was not evidenced by a written memorandum, and the candles, being applicable to the general trade were "goods," although they were not yet made. (9 Mete. [Mass.] 177.)

§ 124. **Receipt and acceptance.**—A contract need not be in writing if there is a receipt and acceptance of part of the goods. Both are necessary. A receipt without an acceptance or an acceptance without a receipt is not sufficient. Goods may be received for the purpose of making an examination and afterwards be rejected. *Acceptance* is the assent of the buyer to become the owner. *Receipt* is taking possession of the goods. There can be no receipt so long as the seller retains or has a lien on them. A delivery of part of the goods sold, and an acceptance of them by the buyer, will comply with the

necessary requirements. If there is no agreement as to the time for payment and delivery, they are to be performed at the same time.

§ 125. **Earnest or part payment.**—If the buyer "gives something in earnest to bind the bargain or in part payment," the statute will be satisfied. These terms are regarded as synonymous. To be part payment, something of value must be actually paid and accepted. A mere promise will not suffice. Generally, the payment may be made at any time. In New York and a few other states, the payment must be made at the time of the making of the contract. When a part payment is made, this will make a receipt and acceptance unnecessary.

§ 126. **Note or memorandum.**—No prescribed form is required. The memorandum should contain, in substance, the material facts; the names of both parties; the subject-matter, identifying the property to be sold; the price actually agreed upon; if on credit, the time and manner of payment. It must be signed by the party to be charged, or by his authorized agent. The correct way is for it to be signed by both parties, since it may be uncertain which may seek to avoid the performance. An auctioneer is the authorized agent of both parties for the purpose of signing the memorandum.

§ 127. **Effect of non-compliance.**—It is probable that many parties to contracts of sale, in the ordinary course of business, do not occupy their minds with such matters as part payment, part delivery, or earnest money, at the time of the sale. When one of the parties refuses to carry out his part of the agreement due to changes in markets, this becomes a matter of serious consequences, particularly if the other party to the contract has no written evidence of the agreement.

Between the time of making the contract and the time of delivery, there may have been a rise or a drop in the market price of the goods involved. One of the parties may wish to avoid a bad bargain. If the agreement has not been reduced to writing, or the other necessary conditions performed, the one who wishes to escape liability may be legally relieved by taking advantage of the failure to comply with the requirements set out in the Statute of Frauds.

It should be noted, however, that those contracts which have failed to comply with the requirements are not void but merely unenforceable. The one who is dissatisfied with the contract can be held to its performance unless he raises the defense provided by the statute. On the other hand, business men perform many oral contracts which they might evade technically under the provisions of the statute.

Anson sold to Kipling by a verbal agreement five thousand bushels of corn at a stipulated price. As part of the contract, Kipling furnished and delivered to Anson the sacks necessary to be used in transporting the corn. Anson endeavored to deliver the corn, but Kipling refused to accept or pay for it. The question arises whether the delivery of the sacks by Kipling constitutes part payment within the meaning of the Statute of Frauds so as to cause Kipling to be liable on his contract. (18 N. E. Rep. 24.)

H. H. Deel sold to a commission merchant a carload of onions under an oral contract. When the car arrived at its destination, the commission merchant opened and examined several of the bags containing onions. After making the examination, the merchant wrote to Deel rejecting the shipment on the ground that the onions did not correspond with the samples submitted when the sale was made. The question in this case arises whether the examination of the onions constitutes a receipt and acceptance so as to cause the merchant to be liable. (79 N. E. Rep. 781.)

QUESTIONS FOR DISCUSSION
(Oral)

1. State which of the following contracts are for the sale of "goods, wares, and merchandise."

(a) Sale of thirty bushels of potatoes.

(b) Sale of ten shares of General Electric Light Co. stock.

(c) Sale of two horses.

(d) Pruning ten apple trees.

2. (a) Gilbert said "I offer you my potato crop which I expect to harvest next month, for ten dollars." Jones replied: "I accept." Is this an enforceable contract? (5 B. & C. 829.)

(b) Adams said: "You may have all my oil wells for five dollars." Jacobs replied: "I accept." Is this a sale?

3. Does the Statute of Frauds according to the Sales Act extend to a "contract to sell" as well as to a "contract of sale"?

4. (a) Does the making of a suit of clothes by a merchant

tailor, who furnishes all the material, come within the provisions of the Statute of Frauds?

(b) If the customer furnishes part of the material for making the suit of clothes will that act change the situation?

5. William White entered into an agreement with a coal dealer for the purchase of fifty tons of coal for $250, the coal to be delivered in November. Explain the different ways this transaction might be taken out of the Statute of Frauds.

6. I. M. Singer received an order by telephone for 20 cases (market price $100) of Delux mustard, his stock brand. Singer informed the customer that his stock was temporarily exhausted. He promised, however, to fill the order on Saturday. Is this an enforceable contract?

7. "To satisfy the requirement of the Statute of Frauds there must be a receipt or acceptance." Correct the statement so that it conforms to the law.

8. Mrs. Jones had a washing machine on trial. She retained it for nine months, and then informed the dealer she was not satisfied with the machine and attempted to return it. May she do so?

9. An oral agreement between L. M. Tone and John Low resulted in the sale of an automobile to Tone. The car was parked at the time on Fairfield Avenue. Low gave Tone the keys to the car at the time of the sale. A few minutes before Tone arrived where the car was parked, a city fire truck operated in a careless and negligent manner, crashed into the car and demolished it. Who suffers the loss?

10. (a) What is the distinction between earnest money and part payment?

(b) Would money placed in the hands of a third person, to be forfeited in case of failure to perform, satisfy the requirements of the Statute of Frauds?

CASE PROBLEMS
(Written or Oral)

No. 132

Kupper agreed orally to sell Whitman one hundred boxes of apples for $200. Whitman took one of the boxes away with

him. If either party should refuse to perform would the other party have a remedy? What would it be? What would your answer be if Whitman paid $10 on account?

No. 133

Kupper agreed orally to sell Whitman one hundred boxes of apples for $200. White was to deliver the apples. When the carrier delivered the apples Whitman looked at them, and said "They are not satisfactory, I do not want them." What remedy, if any, does White have? What would your answer be if Whitman had examined and approved apples before they were delivered to the carrier?

No. 134

Robinson, a cigar dealer, called Livermore, a cigar manufacturer, on the telephone, and requested the latter to ship him ten thousand cigars of a particular brand known as Excelo. Livermore reported that while those cigars were a stock brand he did not have any on hand, but would make and ship them in ten days. Robinson consented to the proposition, and refused to accept them when delivered. When sued he contended that he was not liable since the contract was not in writing. Would this be a good defense in your state?

No. 135

Plaintiff entered into an agreement to sell defendant a number of hogs at an agreed price. Each of the parties placed a sum of money in the hands of a third party as a forfeit in case of non-performance of the contract. The defendant refused to receive and pay for the hogs, and the plaintiff brought suit for damages. Is the money deposited as a forfeit considered part payment? Is the contract enforceable? (60 Mo. App. 635.)

No. 136

The buyer agreed orally with the seller to take all of the chickens the seller's incubator would hatch during the month of April, at five cents each. It was uncertain at the time of the making of the contract whether the total price would exceed $50. In April there were twelve hundred hatched and ready for delivery. The buyer refused to take and pay for them. He pleads as a defense the Statute of Frauds. Result? (73 Ind. 418.)

Chapter XXIV

SALES: TRANSFER OF TITLE

Keep in mind these questions when studying this chapter:

1. **In a general way, what is meant by title?**
2. **Why is it useful to know when the title passes?**
3. **What does the intent of the parties have to do with passing of title?**
4. **What are the general rules for determining when title passes?**
5. **How can sales in fraud of creditors be guarded against?**

§ 128. **When title passes.**—Title today is used to signify the legal right of ownership of certain objects commonly known as property. In the sale of personal property, it is important to know just when the title or ownership passes to the buyer. If the property is lost, stolen, or destroyed, the loss will fall upon the one who has the title—the ownership. The gain also goes with the title. It should be noted that ownership does not necessarily depend upon possession. There may be possession and not ownership—and ownership and not possession.

(1) *Intention of the parties.*—It is a general rule that the title passes when it is the intention of the parties to the bargain that it shall pass. The intention may be ascertained by having regard to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. Ordinarily, it will be presumed that the title and ownership will become invested in the buyer at the time the contract is made.

Fisk owned valuable law books which he offered to sell to Meyers. Meyers was willing to buy. Accordingly he was given possession, although no price had been agreed upon between them. While Meyers had the books and before the price was agreed upon they were seized by an officer on a writ of attachment to settle a claim in favor of Callaghan against Fisk. Meyers brought suit against Callaghan for damages, contending the books were his. Callaghan insisted that title to the books could not pass until a price had been agreed upon, and that they therefore still belonged to Fisk.

It was held that: An agreement to sell, with delivery, may complete the sale, and vest the title, although no definite price be fixed at the time of the sale. Whether the sale is executed and the title passes to the buyer depends upon the intention of the parties. Title had passed, and judgment was given for Meyers. (89 Ill. 566.)

§ 129. **Title of the buyer.**—A purchaser does not acquire a better or greater title in goods than the seller. In other words, a person cannot sell something he does not own. If goods are bought from a thief, or a finder, or one who had no authority to sell, the buyer obtains no right of ownership against the true owner. He merely gets whatever rights the seller had, and no more. The owner may take his property wherever he finds it. The buyer must look to the seller personally for damages. This is true although the goods were bought in good faith and full value was paid for them.

§ 130. **Exceptions.**—The rule above stated does not apply to negotiable paper; it is an exception. If the negotiable paper is transferable by delivery, the purchaser who buys it before due, and in good faith, acquires a title thereto, although it may have been bought from a thief, or one who had no right to sell it. Furthermore, if the owner of the goods or chattels should be induced by fraud to part with them, he cannot reclaim them from one who later bought them in good faith.

§ 131. **How ownership is determined.**—Unless a different intention appears, the following rules are applied for the purpose of ascertaining the time at which the title in the property is to pass to the buyer.

(1) Where there is an unconditional contract to sell specific goods, in a deliverable state, the title in the goods passes to the buyer when the contract is made. It is immaterial whether the payment, or delivery, or both be postponed to some future time.

There was an agreement signed January 4 by Mr. Baxter and Mr. Farling to sell and buy a stack of hay standing in Baxter's field, at a certain price, payment to be made February 4, but the hay was to be allowed to remain where it was until May 11. The hay was wholly destroyed by fire January 20 without any fault or neglect of either party. This was held to be an immediate, not a prospective sale, the property rested in the buyer, and the loss by fire fell upon him. (4 B. & C. 360.)

(2) If the seller is bound to do something to the goods for the purpose of putting them into a deliverable shape (as to paint a car), the title in the goods does not pass until such thing be done.

Two farmers entered a store at the same time. One of them selected a barrel of flour, had it rolled to the door, where he was to get it later in the day. The second farmer said he would take a barrel of the same flour and would call for it on his way home. In the meantime a fire destroyed the store and flour. The title to the first barrel of flour had passed to the first farmer and the loss was his, although he had paid no money and had no receipt for the goods. The loss for the second barrel fell on the merchant. The title had not passed in the last instance. Why should that be the law?

(3) When the goods are delivered to the buyer, on approval, on trial, or on satisfaction, they must be approved or tried before the title passes. If the buyer does not signify his approval or acceptance, but retains the goods without giving notice of rejection, at the end of a reasonable time (if no time has been fixed) the buyer will be regarded as having approved them, and the title in the goods will pass to him.

(4) When the goods are delivered to the buyer "on sale or return" the title passes to the buyer on delivery, with an option to return the goods or to revest the title in the seller. The goods must be returned within the time fixed in the contract, or within a reasonable time, if no time has been designated.

(5) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or transportation charges, the title does not pass until the goods have been delivered or reached the place agreed upon.

(6) Where there is a contract for the sale of a portion of goods in a mass or bulk, the title in the property will not pass until the goods, which are to constitute the subject of the sale, are separated or selected from the stock and identified as the subject of the sale for transfer. If goods are to be manufactured, the title will not pass until they are manufactured and tendered.

To the foregoing rule there is an important exception. It is held by the courts in many of the states that when there is

a sale of but a part of a mass in which every particle is exactly like every other particle, it may be agreed that the title to the portion sold shall pass from the seller to the buyer before it is separated from the mass. This will apply to the sale of a certain number of gallons of oil out of a tank, a certain number of bushels of grain out of a bin or elevator, a certain number of tons of coal out of a heap of coal of the same kind, size, and grade.

(a) *Conditional sales.*—A sale of goods with the express agreement that the title to the property is reserved by the seller until some condition is performed, such condition usually being the payment of the purchase price, is defined as a *conditional sale.* The right to the property under this law remains in the seller, notwithstanding the goods may have been delivered. Upon a default in payment, the seller has the right to retake the property. When retaken, the whole indebtedness of the buyer is thereby discharged.

This class of sales has become quite common, especially the sale of furniture, machines, and sets of books sold on the monthly installment plan. It also serves a useful purpose in enabling persons with small credit to buy expensive machinery and develop small industries. The goods are sold under a special contract by which they are delivered with the first payment, the parties agreeing that the right of ownership is to be retained in the seller until the entire purchase price is paid.

In a majority of the states, statutes have been enacted which require that these conditional sale contracts be recorded or filed in the office of the proper official, otherwise a sale of the property to an innocent purchaser would convey good title, and the seller would lose his rights.

In some of the states, it is also the law that the buyer may recover the partial payments made if he has defaulted in making a full payment, and the seller retakes the goods sold. In the absence of such statutory regulations, the buyer cannot recover the partial payments made. To permit this to be done would be offering a bounty for the violation of a contract.

A merchant sold household furniture to a buyer upon the condition that the title was to remain in the merchant until the last payment was made. The furniture was delivered to the buyer, who subsequently

moved, with the knowledge of the merchant, to another country, taking the furniture along. The buyer then sold the furniture to the proprietor of a hotel upon a conditional contract, which was duly recorded. The first sale was not recorded. The merchant, by his negligence, lost the title to the furniture, which now reposed in the hotel proprietor. The failure to register the contract rendered the instrument void as against a subsequent purchaser for value.

§ 132. **Risk of loss.**—The goods remain at the seller's risk until the title is transferred to the buyer, unless it is otherwise agreed. When the title has been transferred to the buyer, the goods are at his risk, whether they have been actually delivered or not.

When the goods have been delivered to the buyer in accordance with a contract of conditional sale that the title is to remain in the seller as security for the payment, the goods are at the buyer's risk as soon as they are delivered. If after they are delivered they should be lost or destroyed, while in the buyer's possession, but without his fault and before the purchase price is due, the seller can collect the full amount due. This is on the principle that the seller has done what he was bound to do when he delivered the goods.

§ 133. **Auction sales.**— (1) Where goods are put up for sale by auction, a sale is complete when the auctioneer announces the completion by the fall of the hammer, or in any other customary manner. Until such announcement is made, any bidder may retract his bid, or the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. (2) The seller may reserve the right to bid. (3) If the seller has not reserved the right to bid by giving notice, it is not lawful for him to bid for himself or employ other persons to bid on his behalf. A sale contravening this rule may be treated as fraudulent by the buyer.

Plaintiff bid in and bought a tract of land sold by an administrator, at public auction under an order of court. The purchaser filed exceptions to the report of the administrator, contending that he bid the sum reported, due to the administrator having "puffers and by-bidders."

The court held that good faith is an indispensable element of fair dealing, and that it is impossible to imagine a purpose consistent with it, for which sham bidding is necessarily employed. The vendor may prescribe conditions of sale which will enable him to retain the property should it not come up to his price, but he must do so openly and not covertly. The sale was therefore fraudulent and void. (14 Pa. St. 446.)

§ 134. **Bulk Sales Act.**—Laws regulating the sales of stocks in bulk have been passed and are in force in all the states. This law refers to the sale in bulk, of any part or the whole of the stock of merchandise pertaining to the business of the seller, otherwise than in the ordinary course of trade. The purpose of such statutes is to prevent the defrauding of creditors by the secret selling in bulk of all of a merchant's stock of goods for cash, pocketing the proceeds, and refusing to pay his debts, "or leaving for parts unknown." The law provides that such sales are not good unless the creditors have had sufficient notice to file claims protecting their interests. In some states, such sales are absolutely void, and the merchant is guilty of committing a felony.

QUESTIONS FOR DISCUSSION
(Oral)

1. Edmond and a merchant are bargaining with each other about the sale of a basket of flower seed. A gust of wind upset the basket and the seed was blown in all directions. Explain the importance of knowing whether title has passed in this case.

2. A clerk shows Adams a pair of trousers priced at $10. Adams says, "I will take this pair; show me a belt." The trousers were left on the counter while Adams and the clerk stepped over to the case containing belts. Adams finally selected a belt. On returning they found the trousers had been stolen. Must Adams pay for the trousers? How will this question be determined?

3. A thief got possession of Hill's note and watch. He sold both to Jones. The real owner (Hill) seeks to recover from Jones. Will he be successful in both instances? Trace the title of the note and the watch.

4. Young bought a brood of chickens from Shibes. It was agreed that the chickens should remain with the mother-hen until they could take care of themselves. The entire brood was lost in a flood. Who suffers the loss? Explain.

5. Meyer agreed to build an airplane for Schnell for $200. Schnell paid Meyer $175. The airplane was to be completed by January 1. Meyer became bankrupt before having finished the plane. Schnell claims that title to the airplane has passed to him. Is his claim valid? What is the test?

6. The Brass Works Co. left a "washer" at the home of Mrs. Williams to be tried by her, with the understanding that if she approved of the machine she could have it for $100 cash, or ten monthly payments of $12 each. After she had "tried it out" for three months, she returned the washer. The brass company refused to accept it. Explain the rights of the respective parties.

7. Plaintiff sold to defendant a radio outfit for $150. It was to be delivered on the day of sale but payment was to be made in monthly installments of $15 each. Before delivery it was destroyed by fire through no fault of the plaintiff. Who suffers the loss?

8. The publishers of a dictionary received an order for ten copies to be shipped to a distant city. Terms of sale: Cash in ninety days. The box of books was delivered to the railway company where it was destroyed by fire. Can the publishers collect from the purchaser?

9. Holt sold Brown an automobile, reserving the title in himself (Holt) until Brown had paid the debt in full. Before the final payment had been made, Brown sold the machine to White. Holt seeks to recover the machine from White because Brown failed to complete his payments. What disposition should be made of this case?

10. The Packard Music House sold a piano to Rebber under a title reservation contract, payments to be made at the rate of $15 per month. Before the piano was paid for, and while it was in the possession of Rebber, it was damaged by fire through no fault of Rebber. The Packard Music House asserts that the loss should be suffered by Rebber. Is the contention of the company valid?

CASE PROBLEMS
(Written or Oral)

No. 137

Brownson sold his automobile to Blake at 9 o'clock on August 4. He gave Blake a written order on the garage where the automobile was kept. At 11 o'clock, and before the order was presented, the garage was completely destroyed by fire. Blake sues Brownson for the value of the automobile. Result? (60 Conn. 363.)

No. 138

A jeweler sent two diamond rings to a customer, under an agreement that if she were pleased with them she would keep them and pay an agreed price, but if not pleased she was to return them. The rings were lost before they were returned, but without any fault of the customer. Upon whom must the loss fall? Was the title in the seller or purchaser at the time the loss occurred? (78 Ark. 123.)

No. 139

Roe purchased of Davis a piano for $300, on what is known as the installment plan, the title to remain in Davis until the final payment was made. When $100 of the purchase money had been paid, Roe's residence, including the piano, was destroyed by fire. Who should sustain the loss of the piano? If this piano had been destroyed on the day of sale, but before it had been delivered or a payment had been made, what would your answer be? (135 Miss. 48.)

No. 140

Brown agreed to make a wagon for Smith out of materials to be furnished by Brown. Brown proceeded to build the wagon. Smith advanced some money on the wagon before the work was started, and as it proceeded he examined the work, expressed his approval and also advanced more money. When the wagon was nearly finished, and before it was delivered, it was destroyed by fire, and Brown was unable to deliver at the agreed time. Smith sued Brown. What defense, if any, did Brown have? (34 Me. 107.)

No. 141

Baldwin contracted to buy a lumber yard that had been owned by a large company for four years. Under these circumstances, is the same procedure required as in buying a grocery store or a general merchandise business in bulk? With what information should the buyer be furnished?

No. 142

Cattle were sold for $390, and $50 was paid on account. The cattle were left in the seller's pasture, to be taken away by the buyer within three months. In the meantime they were swept away by an unprecedented flood. Who suffers the loss? (39 N. Y. 275.)

No. 143

Cope, a man of literary and artistic taste, was a frequent shopper at X's book store. When he found something he liked he would say, "Put this away for me, I will take it." The items were placed in a special drawer to which only Cope and one salesman had access. At the time of Cope's death there was an accumulation of several thousand dollars' worth of merchandise in the drawer. The merchant seeks to recover this amount from Cope's estate. The question is whether title had passed or not. How should the courts settle this question? (191 Penna. 589.)

No. 144

Axtell bought one hundred bushels of barley out of a lot of three hundred bushels, in a large heap. After the seller had filled the sacks furnished by the buyer for that purpose, the latter emptied them back onto the heap because he was unable to get trucks to transport the barley. There was a controversy then as to whether the title had passed. What is your opinion? (7 E. & B. 885.)

Chapter XXV

RIGHTS AND DUTIES OF THE VENDOR AND VENDEE

Keep in mind these questions when studying this chapter:

1. **What are the rights of the unpaid vendor?**
2. **In what respect does a "lien" differ from title?**
3. **When does the right of stoppage in transitu begin, and end?**
4. **What are the duties of the buyer and seller in relation to delivery, receipt, and payment?**

§ 135. **Seller's lien.**—Notwithstanding that the title in the goods may have passed to the buyer, the unpaid seller has a right or lien on them, for the price, while they are in his possession. A lien is a "right to hold goods, the property of another, in security for some debt, duty, or other obligation." In a sale of goods on credit, or an agreement to deliver at a certain place, the seller must comply with the conditions of the sale. A tender of payment discharges the lien.

§ 136. **Stoppage in transitu.**—A seller, who has placed goods in the charge of a carrier for delivery to a buyer at a distance, may retake the goods at any time while in transit, if they are unpaid and the purchaser is insolvent, or becomes so after the sale. This is a right, conferred by the law upon the unpaid seller, and is known as the right of *stoppage in transitu*. It is based upon the principle that one man's goods should not be applied to the payment of another's debts.

The conditions under which the vendor may exercise this right are:

(1) The price must be unpaid.
(2) The buyer must be insolvent.
(3) The goods must be in the hands of a third person, in transit from the seller to the buyer.

(1) *Price unpaid.*—The fact that the goods have been sold on credit, which ordinarily is inconsistent with a lien, does not affect this right of the vendor, for there is an implied condition that the vendee will maintain solvency.

(2) *Insolvency.*—The buyer need not be an adjudged bankrupt or insolvent in a legal proceeding. It includes everyone unable to pay his debts in the ordinary course of business. However, the seller exercising this right does so at his peril. If the buyer should be solvent, the former will be liable for any damages resulting from the stoppage. The buyer can always defeat the right by paying for the goods.

(3) *In transit.*—The goods are considered in transit until they are delivered to the buyer. If the goods are at their destination, but in possession of the carrier or some middleman, the unpaid seller may exercise his right of *stoppage in transitu.* He may do this by describing the goods, stating the right exists, and ordering the carrier not to deliver them to the consignee. The carrier must redeliver them to the seller, whose duty it is to pay the transportation charges and the expense of the redelivery.

§ 137. **Delivery.**—It is the seller's duty to deliver the possession of the article sold to the buyer, or to someone designated by him. Delivery is placing the property at the disposal of the buyer. This must be done in accordance with the terms of the contract.

What constitutes delivery may become a question of importance, in order to fix responsibility. If the article sold is merely a pair of shoes, a suit of clothes, a watch, or groceries, the delivery ordinarily consists in the act of the seller handing over the goods, and the buyer accepting and carrying them away. If the thing sold is an automobile, a cow, or coal, delivery is brought about by the seller relinquishing his right or control over the thing sold and the buyer taking possession.

(1) *Time and place.*—When neither time nor place of delivery is specified, it must be at the place where the property is when the sale is made. The usages of trade will influence the matter of delivery to some extent. The practice of ordering groceries over the telephone impliedly obligates the delivery to the customer's house, while a strict rule of law would not require the delivery outside the place of business. When the seller is bound to send the goods to the buyer, but no time for sending them is fixed, it must be within a reasonable time.

"Under a contract for 2,500 cigars to be shipped at once," the seller cannot wait nineteen days before shipping.

Defendant Ford sold plaintiff his automobile, which was at the time in a garage belonging to Young. Nothing was said at the time of making the sale as to where the car was to be delivered. Plaintiff now insists that defendant is to deliver the car at plaintiff's residence. The defendant refuses. This he may rightfully do. Plaintiff must go after the car.

(2) *Wrong quantity.*—The buyer has the right to insist that the proper quantity be delivered. If the contract is for a definite quantity, the buyer may refuse to accept if more or less is tendered. On the other hand, he may accept the amount delivered, in which case the acceptance would amount to a new contract. Unless otherwise agreed, the buyer need not accept the delivery by installments. The buyer is not bound to return to the seller goods wrongly delivered. It is sufficient if he notifies the seller that he refuses to accept them.

On a contract of sale for 5,000 barrels of oil to be delivered at a station, the seller delivered 5,981 barrels of the quality ordered by the buyer. The seller instructed the buyer to take 5,000 barrels out of the lot, which he refused to do. This was held to be a good tender because the correct number of barrels could be separated from the lot without inconvenience or expense. (77 Penna. 53.)

(3) *Delivery to a carrier.*—Where the agreement is, that goods are to be sent by a carrier to the buyer living in a distant city, delivery to the carrier will be considered delivery to the buyer. The seller must send them as directed, and when he has done so his responsibility ceases.

Brown received an order by mail from Jones for thirty tires. The goods were delivered to a common carrier. Enroute by rail to the buyer's destination, the tires disappeared, and Jones never received them. After the seller delivered the goods, he had no further duties to perform under the contract. The title passed to the buyer at the time of delivery to the carrier. (165 N. Y. S. 1006.)

(4) *Refusal to accept.*—It is the duty of the buyer to accept the goods, and he will be liable to the seller for any loss occasioned by his neglect or refusal to take them, and for reasonable charge for their care and custody. The purchaser of a particular article is not obliged to take another in its place, although it may be just like the one sold.

The seller usually has his choice of three courses to follow when the buyer refuses to accept the goods:

(a) The seller may keep the goods, subject to the call for them by the purchaser, and sue the buyer for the purchase price.

(b) The seller may resell the property and recover from the first buyer the difference between the new and the old price. The seller must act in good faith and exercise diligence in effecting a sale at the best price.

(c) The seller may keep the property for himself and sue the purchaser for the difference between its value and the price the buyer agreed to pay for it.

QUESTIONS FOR DISCUSSION
(Oral)

1. Skiff sold an automobile to Moore for cash. Skiff now refuses to deliver the car to Moore until paid. Skiff wants your opinion whether he must surrender the car before Moore pays.

2. Facts as in question 1, except that Skiff delivered the car to Moore before it was paid. Skiff wants your opinion as to how this affects his lien. What would be the effect if the terms were cash in sixty days?

3. Logs were sold to be delivered "over the dam" at the outlet of Moosehead Lake, thence to be driven by a certain log-driving company to the purchaser's booms and mill. Up to what point may the seller exercise his right of stoppage in transitu? (48 L. R. A. 50.)

4. Winters sold Summers a shipment of shoes. The seller knew that Summers was insolvent at the time of the sale, but he had reason to believe that he might be solvent in a month or two. May Winters exercise the right of stoppage in transitu? (15 Wend. 137.)

5. On a contract of sale for a definite number of barrels of oil to be delivered at a station, the seller delivered more than the agreement called for. May the buyer refuse to accept any of the lot offered? Is this a good tender?

6. Suppose in question 5, the seller insisted that the buyer should take and pay for the entire lot, what would be the result? What would be the effect of an offer of 4,000 barrels in the present shipment (the sale being 5,000 barrels) and 1,000 barrels one day later?

7. The owner of a pond contracted to sell Flynn all the ice on his pond, but he permitted a third person to take a part of it. Flynn now refuses to take any of the ice. On what does he base his refusal? (8 Mo. App. 483.)

8. The seller agreed to furnish goods by a steamer, and to pay charges. (This is an f. o. b. destination shipment.) The steamer arrived at the destination but the buyer failed to receive the goods. Must the buyer pay? (62 N. Y. 272.)

9. Lacy sold a stack of hay to Reed. It was agreed that the hay was to be pressed by Reed on Lacy's premises, after which it was to be delivered by Lacy and then to be paid for. After a delay of forty-five days, Reed came to press the hay. Lacy now refuses to go on with the bargain. Must he do so?

10. Where the seller agrees to deliver, and no time is set for the delivery, when must it be made? (47 Mich. 162.)

CASE PROBLEMS
(Written or Oral)

No. 145

A traveling salesman for a wholesale house took an order from a retail merchant for a carload of sugar. At that time the merchant made a financial statement showing he was worth $5,000, and that his indebtedness did not exceed $1,000. This statement was sent to the wholesale house with the order. Relying upon the statement, they shipped the sugar, but before it was delivered the house learned that the financial statement was false, and that the merchant was insolvent at the time the order was given. What right has the wholesale house with regard to the sugar? What is the first step the wholesale house should take in protecting this right? (37 Calif. 630.)

No. 146

In March, Shaw contracted to deliver to Hope, before the first of May, five hundred bushels of corn at 50 cents per bushel. Shaw delivered thirty bushels in April, none in May, and three hundred bushels in June, all of which Hope accepted. Is Shaw entitled to recover for any part of the corn delivered, and how much? (167 Ill. 222.)

No. 147

Root purchased lumber from Barnard which was measured and placed in a separate pile. Root sold the lumber to Perrine for cash. Barnard refuses to give Perrine possession of the lumber because he has not been paid. May Barnard keep the lumber until payment is made? (142 Ind. 448.)

No. 148

The seller shipped some lumber to the buyer, a corporation. While the goods were enroute, the seller became suspicious of the deal and, upon examination, found that there was no such corporation located at the place given in the order by the buyer as its place of business, and that its name did not appear in the city directory. Does this justify the seller in stopping goods in transit? (93 Wis. 250.)

No. 149

A farmer sold corn to a miller. Nothing was said about delivery. Part of the corn was delivered to the mill. The farmer now refuses to deliver the remainder, arguing that it is the duty of the buyer to call for it. Is this a breach of contract? (22 N. J. L. 525.)

Chapter XXVI

SALES—WARRANTIES

Keep in mind these questions when studying this chapter:

1. Is there any particular reason for warranties in a sale?
2. What is the doctrine of caveat emptor, and its application?
3. When are implied warranties considered part of a sale?
4. How does a sale by description differ from a sale by sample?
5. What are the general remedies for a breach of warranty?

§ 138. **Definition.**—A warranty is a legal obligation or undertaking by the seller that the property is, or shall be, as it is represented or promised to be. A warranty may be express or implied and may relate to the title, quality or condition.

§ 139. **Express warranties.**—An express warranty is a contract independent of a sale. No particular form of words is necessary to make a warranty; the seller need not "warrant" or "guarantee." It will be sufficient if the vendor asserts a fact of which the buyer is ignorant and on which he relies, in making the purchase.

Where there is an express warranty, the purchaser may recover damages suffered by a breach of the warranty. Such an agreement will enable the buyer to recover damages from the seller, when he might not have had any redress if there had been no warranty. It will be noted that an express warranty entitles the injured party to obtain damages, but some courts hold that it does not entitle the buyer to cancel or rescind the contract.

A statement by the seller, of his opinion or belief as to the value or merits of the article, or commendations usually used to induce a purchase, are not considered warranties. Such expressions are regarded as "puffs" or "trade talk." "This is the best on the market" is an expression of an opinion, and not a warranty. A horse represented to be kind in single or double harness does not include a warranty that he will not

take fright at an automobile. It is always permissible for the seller to praise his goods in order to enhance their value.

Statements, such as "the best piece of cloth in the market," "good, excellent, better," or "suitable and proper for the New York market," are not warranties. The word "excellent," used by a seller in reference to his goods, is a commendation of them. A statement "that a derrick for use in a particular place would require a load of two hundred fifty tons to break it" would be a warranty.

A warranty does not extend to defects that are actually known or apparent, or which require no skill to detect, unless the seller used some artifice to conceal the defects.

Roe sold a motor truck to Jones and warranted that it would carry eight thousand pounds. It failed to carry this amount. Jones could recover damages from Roe on his express warranty. If there had been no stipulation as to the amount the truck would carry, Jones would have no redress.

§ 140. **Caveat emptor.**—This is a Latin phrase used in reference to the sale of goods. Translated it means "Let the buyer beware." This is one of the oldest rules of the common law. Its purpose is to decrease litigation and to make men self-reliant by demanding reliance upon their own judgment. If the buyer gets the worst of the bargain, he cannot blame some one else for his own carelessness. Under this rule of law, there is no implied warranty of quality or fitness where the goods are, or may be, inspected by the purchaser. In the absence of fraud or concealment, the buyer cannot claim damages for defects which might have been detected by ordinary inspection. It is the duty of the buyer to examine and test what is bought. The improper labeling or marking of goods would be a fraud; a purchaser has a right to rely on the correctness of such labeling. The seller has no right to deceive the purchaser, but he need not prevent the buyer from deceiving himself. If the buyer is unwilling to rely on his own judgment, he should demand an express warranty from the seller against defects.

§ 141. **Implied warranties.**—In every sale of personal property, there are certain implied warranties. They are not in addition to the contract, but are a part of it, although they need not be expressed orally or be mentioned in writing. Im-

plied warranties will extend to the title, quality, and quantity of the goods sold.

(1) *Warranty of title.*—There is an implied warranty on the part of the seller that he has a right to sell the goods in his possession at the time of the sale. Should a third party prove title as the true owner, the buyer may recover damages against the vendor. The seller may, however, merely sell whatever right he has in the property. Under such circumstances the warranty would extend only to whatever title the seller had at the time, and no other.

It should be noted that there is no implied warranty of title in the sale of real estate. In such a sale the warranty must be expressly "covenanted" or the buyer will be without a remedy if the title should chance to be defective. Also, the rule does not apply to an officer, or to one who is acting for another.

An executor, administrator, trustee, or sheriff, who sells property by virtue of authority of law, in an official capacity, confers no implied warranty of title. In such a sale, the seller transfers only such title as the person had whom he represents.

(2) *Warranty of quality.*—Where a thing is bought for a particular use or purpose, and this is known to the seller, there is an implied warranty that it will be reasonably fit for that purpose. This rule applies to articles to be delivered in the future and not to goods the buyer may have examined, selected, or manufactured according to furnished specifications. Nor does it apply to the sale of a specified article sold under its patent or other trade name.

The application of the principle of the implied warranty of fitness is somewhat difficult. Each case must depend very largely upon the particular facts involved. The buyer always has it in his power to make the seller responsible by an express warranty that the thing bought will be sufficient for the purpose intended.

Adams gave the Acme Manufacturing Company an order for a number of "liquid soap holders" suitable for the use of workmen in shops. The undertaking of the company to furnish them was an implied warranty as to their being suitable for the purpose designated.

Plaintiff ordered defendant to construct a boiler of a specified size, make, and power. The defendant constructed the boiler according to specifications, but it would not develop sufficient power to operate plaintiff's plant. The defendant was not held liable since he had followed instructions.

In an early case it was said, "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequence; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the buyer will not be able to ride it, that would not make him liable." If he had said, "Sell me that gray horse if he is fit to ride," and the seller had sold the horse, knowing he was unfit to ride, he would have been liable.

(3) *Sale by description.*—There is an implied warranty in a sale of goods by description that the article conforms to the description, both in kind and quality. In addition, the thing sold must also be merchantable. The buyer has a right to expect a salable article answering the description in the contract. There is no implied warranty if the buyer examined the article before it was bought, where there are defects apparent which such an examination should have revealed. Of course, the seller does not impliedly warrant that it will continue merchantable. If goods are to be shipped to a distance —especially any kind of provisions—they must be fit at the time they are shipped.

In the sale of articles of food for immediate domestic consumption, there is an implied warranty that the articles are good, wholesome, and fit for use. In some jurisdictions, the rule does not apply where the sale is between dealers.

While a butcher or grocer impliedly warrants the wholesomeness of his goods, if a farmer sells an animal to the butcher to be killed and sold as meat, or a load of beans to the grocer, there is no implied warranty as to quality.

A butcher sold to the plaintiff pork that turned out to be unwholesome and unfit for use, and caused those who partook of it to become sick. The defendant did not know the meat was unwholesome, but he was nevertheless held liable. The vendor has better facilities for ascertaining the soundness or unsoundness of the article offered for sale than the purchaser, and it is safer to hold the vendor liable than to compel the buyer to assume the risk. (171 Ill. 93.)

(4) *Sale by sample.*—There is an implied warranty that, in the sale by sample, the goods will conform to the sample in kind and quality. To constitute a sale by sample, it must be intended as such by the parties and the sample must be exhibited to the buyer as a sample of the thing to be sold. If there are defects in the sample, the purchaser cannot complain of defects in the bulk of the goods purchased.

§ 142. **Remedies for breach of warranty.**—The remedies provided in the sales act are those well established by the courts generally. Where there is a breach of warranty by the seller, the buyer may, at his election:

(1) Keep the goods and bring a suit against the seller for damages because of the breach of warranty.

(2) If the title has not passed to the buyer, refuse to receive the goods and maintain an action against the seller for damages upon a discovery of the breach of warranty.

(3) Rescind the sale; that is, return the goods, or offer to return them if they have been already received, and recover the price, or any part that may have been paid.

The buyer cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to return, or to offer to return, the goods in substantially as good condition as they were when received. If the deterioration is due to the breach of warranty, such injury will not be charged to the buyer in rescinding the sale and returning the goods.

(4) If the seller refuses to accept the offer of the return of the goods from the buyer when such right exists, the buyer may hold them as bailee for the seller.

(5) Where there has been a breach of an express warranty, the measure of damages will be the difference between what the goods were actually worth and what they would have been worth if they were as represented.

(6) In the case of a breach of an implied warranty, the damages will be the difference between the value of the goods at the time of the delivery and their value according to the warranty.

QUESTIONS FOR DISCUSSION
(Oral)

1. York warrants the product he sells Woodward to be "A number one cream." The money consideration is $10. What is the consideration for York's warranty?

2. Woodward threatens not to take the cream sold him. York then warranted the product to be to the entire satisfaction of Woodward. Is this a good warranty? What kind of warranty is it?

3. What is the difference between an implied warranty and an express warranty?

4. Black found a watch on the street. He sought the owner and, being unable to find him, sold the watch to you. The real owner now brings suit and recovers the watch from you. Have you any recourse? On what will you base your rights?

5. The buyer persuaded the seller to warrant an article which he (the buyer) knew at the time to be defective. Should the benefits of such a warranty be extended to the buyer? Give reasons. (73 Nebr. 521.)

6. Is there any social justification for the rule of caveat emptor?

7. Plaintiff ordered a windmill from the manufacturer which proved to be useless, on account of defective material and workmanship. State the various remedies the plaintiff has against the manufacturer.

8. A clothing dealer, in a small village, ordered ten dark suits by sample. The shipment brought him ten dress suits instead, which ordinarily sell for double the price of the kind ordered. He did not discover the difference until the goods were delivered and unpacked. Must the dealer accept the goods?

9. A buyer orders a "Work Well" watch from a jeweler. A watch sold under that name was sent to the buyer, who now objects that it does not have a split second hand, therefore cannot be used to time races. Is he entitled to return the watch?

10. Dodd sold Davis a quantity of wheat, stating that it was "good, fine wheat." In your opinion is this a warranty, an expression of opinion, or merely trade talk? (30 Ill. 81.)

11. A farmer bought a threshing outfit at a sheriff's sale. The outfit was mortgaged. Can the farmer recover on an implied warranty of title from the sheriff? Can the mortgagee recover the outfit from the purchaser?

12. A merchant called up the wholesale house and ordered ten cartons of cookies. After they were delivered, he opened two boxes and found the cookies in a crumbled condition. He now refuses to accept them. On what will the merchant base his right to return the goods? (42 Iowa 185.)

13. List the remedies you *could* apply to the situation stated in question number 12. Also list the remedies you *would* apply.

CASE PROBLEMS

(Written or Oral)

No. 150

A manufacturer requiring soft, tough iron, ordered "XX pipe iron," and after using a part found that it was hard and brittle. It appeared that iron answering this description might be either hard or soft. The iron received was "XX pipe iron." Has the manufacturer a right of action? Why?

No. 151

The vendor gave the vendee a general warranty in the sale of a mule. The seller took the buyer to the barn and showed him the mule which was standing in a dark stall. The mule was unsound. The defect was plainly visible upon examination. The vendee did not examine the animal closely. Having been advised that the mule was known to kick, he relied on the vendor's statement. Does the rule of caveat emptor apply, and does the warranty of soundness hold in this case? (85 Ill. 264.)

No. 152

A contractor sold a furnace, to be installed in the defendant's house by the contractor. It was a well made furnace, but for some unknown cause it did not heat the house. The

defendant refused to accept the furnace or to pay for it. The contractor sued for the price. Is he entitled to recover? (127 Iowa 137.)

No. 153

Allen sold, and delivered to Brown, a horse and warranted it to be sound and healthy. The horse was unsound, but neither party knew it until after the sale had been completed. What may Brown do under the circumstances?

No. 154

Palmer ordered trees from a nurseryman. The trees were not delivered within a reasonable time, and Palmer refused to accept them. The nurseryman thereupon promised the purchaser that if he would take them, he would warrant them against injury from freezing? Will the warranty hold? (14 Wis. 258.)

No. 155

The buyer, a market gardener, ordered from a seed-grower six pounds of "Bristol cabbage seed," and the grower delivered a package thus described. The seed was impure and did not produce Bristol cabbage, but inferior cabbage fit only for cattle. On what will the buyer base his rights, if he has any? (71 N. Y. 117.)

No. 156

Two casks of cloves were sold by sample to the plaintiff. The sample shown was of the best quality of Cayenne cloves. The cloves received contained a mixture of Cayenne and East India cloves. Plaintiff sought to recover damages on a warranty. How will the damages be measured, if he can recover? (13 Mass. 139.)

Chapter XXVII

BAILMENTS

Keep in mind these questions when studying this chapter:

1. **In general, what are bailments?**
2. **How does a bailment differ from a sale? From barter?**
3. **What are the three general forms of bailment?**
4. **When is the bailee liable for injuries to the property?**
5. **What are the degrees of care applied in bailment?**

§ 143. **Bailments in general.**—Bailments apply only to personal property. The law of bailments covers practically every case where the property of a person, firm, or corporation is placed in the possession of another for use, for safe-keeping, or to have work done upon it. It includes property pledged to another to secure a debt, or put in charge of a common carrier (as a steamboat or railroad company) to be transported to some other place. Property taken under an order of court by an officer, or lost property held by the finder, is included under the same law.

The law of bailments is built largely upon the civil law of the Romans, with this difference, however, that under their law, land, as well as personal property, was included. This ancient origin is further seen in the Latin names given by some authorities to the different classes of bailments.

§ 144. **Definition.**—A bailment is the holding in trust of another's property for some definite purpose, to be returned or otherwise disposed of when that purpose is accomplished. Bailment is derived from the French word "bailler," signifying to deliver. The term bailment includes the possession of property without a transfer of ownership, and after a lapse of a certain time, or the happening of some event, the goods are to be returned to the owner or some person designated by him.

Illustrations of bailments.—Milk sent to a creamery to be redelivered as butter; a watch left with a jeweler to be repaired; a package delivered to an express company to be shipped; logs to be sawed into lumber; a

watch left with a pawnbroker to secure a loan; a rented typewriter; a borrowed lawnmower; property left with another for safe-keeping; property that is lost, stolen, or in the custody of an officer.

§ 145. **Parties.**—There are two parties to a bailment: the one who delivers the goods, called the bailor; the one to whom they are delivered, called the bailee. Since bailments are founded upon a contract, express or implied, the parties must be capable of contracting. They are also governed by the same rules as are applicable to contracts in general.

§ 146. **Distinctions.**—In a bailment, the bailee merely has the right of possession (not ownership) for the purpose for which the bailment was created, after which the identical property, although possibly in an altered form, is to be returned to the bailor, or to someone designated by him. In a sale, the absolute title, or ownership, is transferred to the purchaser, although the possession may still remain in the seller. If other property than that received by the bailee is to be returned to the bailor, then it is termed a barter and has the same effect, so far as ownership is concerned, as a sale. If the bailee has an option to purchase goods in his possession, the bailment becomes a sale when the bailee signifies his intention to purchase.

Johnson, the plaintiff, delivered to the defendant, a miller, a certain quantity of wheat, in exchange for which the miller was to give to the plaintiiff a number of barrels of flour already ground. This was held to be a barter. (4 N. Y. 76.)

But if Johnson should deliver to the miller a certain quantity of wheat, and the miller grind the wheat into flour, returning the identical wheat in the form of flour, it would be a bailment.

Money deposited in a bank is not a bailment, for it is not intended that the identical coin or notes the bank received are to be returned to the depositor, but the amount due in any form of legal tender. A coin lent to one to perform a sleight-of-hand trick would be a bailment, because it is intended that the same coin shall be returned.

It has been held that a wagon worth $10 receiving repairs amounting to $80 was a bailment because it was the same property returned—although in a much altered or improved form.

These distinctions between a sale, a barter, and bailment are important in order to determine upon whom the loss falls,

if the property is destroyed while in the care of another person. If the transaction is a bailment and the property is destroyed, through no fault of the bailee, it would be the bailor's loss. On the other hand, if it is a sale or barter, the loss, if any, would fall upon the owner of the property.

§ 147. **Classification of bailments.**—The modern tendency is to classify bailments under three heads, as follows:

(1) Bailments for the sole benefit of the bailor.
(2) Bailments for the sole benefit of the bailee.
(3) Bailments for the mutual benefit of the bailor and bailee.

The need of the foregoing classification is for the purpose of defining the degree of care or diligence required of the bailee, and his liability for negligence in a failure to perform his obligations properly. Every bailee is bound to take some care of the property of others in his keeping, regardless of the kind of a bailment it may be, but the degree of care or liability will depend upon the nature of the bailment, the character of the property, and the custom of the locality.

§ 148. **Degrees of care and of negligence.**—In bailments, the three recognized degrees of care or diligence and the corresponding degrees of negligence respectively are:

(1) Slight care and gross negligence.
(2) Ordinary care and ordinary negligence.
(3) Great care and slight negligence.

Care has been defined to be that diligence which a person is wont to show in the conduct or management of his own affairs; while negligence is the absence of diligence or the omission to do something which a prudent and reasonable man would do.

(1) *Slight care* is that degree of care that inattentive or careless persons exercise in dealing with their own property. The absence of such care is considered *gross negligence.*

(2) *Ordinary care* is that degree of diligence exercised by persons of common and ordinary prudence in respect to their own property. The absence of such care is *ordinary negligence.*

(3) *Great care* or extraordinary diligence is the highest degree of care; it is that degree which persons of exceptional prudence use with respect to their own affairs. The absence of such care is *slight negligence.*

QUESTIONS FOR DISCUSSION
(Oral)

1. Designate which of the following transactions are bailments:

(a) An automobile taken to the shop for repair.
(b) Sale of a sewing machine with the promise that it could be returned if not entirely satisfactory.
(c) Radio outfit delivered to your house on trial.
(d) Mortgaged diamonds. The diamonds are in possession of the bank.
(e) Goods left with a dressmaker to be made into a garment.
(f) Money deposited in a bank.

2. Can you prove through an illustration, that delivery to you of an article by the owner, is not essential to a bailment?

3. Under a contract of bailment, Harris agreed to keep Greene's hunting dog for three months. Harris had permission to use the dog on hunting trips during this time. What is the consideration?

4. Mrs. Sterling kept her neighbor's silverware which she was not permitted to use under the bailment contract. A student argues there is no consideration moving from the neighbor to Mrs. Sterling, consequently there is no contract and, therefore, no liability. Do you agree?

5. Doe was asked to take off his coat and vest to try on a new coat he was about to buy. He was invited to step over to the mirror. While there, his old coat was stolen. Was this a bailment? If so, what kind?

6. Tompkins found a watch. On the case was engraved, "Presented to Harold Lyons on his twenty-first birthday. Athens, Ga." There was no delivery of the watch to Tomp-

kins, nor mention made of its return to the owner, hence the question arises whether this is a bailment or not? How would you classify this act, and why?

7. Black, who broke the handle of White's axe which he had borrowed, bought a brand new one and took it over to White. Was this a bailment?

8. It was dark when Roe gratuitously took a wagon-load of watermelons to market for a neighbor. Before he reached the city he tarried at a tavern. When Roe got ready to continue his journey, the wagon was empty. What degree of care had he exercised and what is his liability? Suppose this had been a load of building stones, would his responsibility have been the same?

9. Hall borrowed his neighbor's Victrola, which he dusted daily, oiled twice a week, and polished every ten days. What degree of care does this represent? How much care was he required to exercise? Under what circumstances would the degree of care have been different?

10. Peck delivered to Brewer a number of sheep. Brewer was to keep the sheep, and take care of them for three years. He was to return to Peck two and one-half pounds of wool each year for each and every sheep, and to retain the balance of the wool for his pay. In your opinion is this a bailment? (48 Ill. 54.)

CASE PROBLEMS
(Written or Oral)

No. 157

Jennie Smith left her typewriter with the Acme Typewriter Co. to be repaired. The following day, the owner of the building occupied by the typewriter company brought suit for rent and levied an attachment on all the property in the rooms of the typewriter company. Jennie requested the constable to return her machine, but the owner of the building said that was a matter for her to settle with the typewriter company.

In your opinion is Jennie entitled to her machine? Was the constable a bailee of the typewriter? Do you believe he had a right to take it? (7 N. Y. Rep. 433.)

No. 158

Harris went into a barber shop and deposited his hat on a rack hung in the shop for that purpose. While he was being shaved, the hat disappeared and was lost. With reasonable care on the part of the proprietor, the loss might have been averted. Is the proprietor a bailee and therefore liable? What would be the value of a notice disclaiming responsibility? (95 Ga. 571.)

No. 159

An agricultural society invited Bromfiel to place his gun on exhibition at its fair. The gun was stolen. Is the society liable? (102 Ind. 146.)

No. 160

Is the leaving of an automobile in a private parking space operated by the owner a bailment? (101 S. 175.) Is the owner of space where an automobile may be left standing or parked a bailee? (211 Ala. 525.)

No. 161

A storekeeper allowed express packages to be left at his store without making a charge for this service, because it made his store a sort of headquarters where men would congregate. How much care will the keeper be required to exercise? (10 Gray 366.)

Chapter XXVIII

RIGHTS AND DUTIES OF THE BAILOR AND BAILEE

Keep in mind these questions when studying this chapter:

1. **What are the rights and duties of a bailor, and bailee?**
2. **Does the character of the goods bailed affect the degree of care?**
3. **What is a warehouseman, his duties, and liabilities?**
4. **Does the finder of lost property have any rights or duties?**
5. **What is the nature of a pledge, and a pawn?**

§ 149. **Bailment for the bailor's benefit.**—The bailee is bound to exercise but slight care and diligence, where the bailment is for the sole benefit of the bailor, and, in the event of loss, he can be held responsible only for bad faith, or gross negligence. An illustration of this kind of a bailment would be where property is placed with another for safe-keeping, or to be carried to some other place, or for the purpose of having some work done on it for the advantage and benefit of the bailor, for which the bailee receives no compensation or derives no benefit for his care or service. Persons do not ordinarily expect superior care to be given in exchange for gratuitous service, and one does not usually get more than he anticipates. The bailee's liability would also depend somewhat on the character of the property intrusted to his keeping. It is obvious that the responsibility for the care of jewelry would be greater than for that of junk.

§ 150. **Law of finding.**—The finder of a lost article becomes the bailee of it for the owner—without compensation unless otherwise provided by statutory law. The old saying of "finding is keeping" is not a rule of law. The finder of a lost article has right of possession to it against everyone but the rightful owner; and if he takes such property into his possession, he at once becomes responsible for its safe-keeping and return. He may also get into serious trouble unless he makes the proper effort to locate the true owner. The circum-

stances of each particular case will determine just what is a reasonable effort.

The statutes of some jurisdictions provide, that if the value of the lost article exceeds a certain amount, the finder must make an affidavit stating where it was found, that the owner is unknown, that the finder has not secretly withheld or disposed of any part of it. A failure to comply with the statutory stipulations imposes a penalty upon the finder. It is not necessarily the duty of the finder to advertise for the owner unless that method seems to be the way most likely to locate him. In some states it is the law that a failure to make a reasonable effort to find the owner makes the bailee guilty of larceny.

Property found upon a street car should be turned over to the conductor, or the "lost property" department of the company (taking a receipt admitting the finder's claim)—not that the company has the better right, but that this is the best way of locating the owner. Articles found upon the highway should be left at the nearest police station, or the authorities should be notified of the finding. If the property is not claimed within a reasonable time, the finder may insist upon its return, if left with someone else pending the discovery of the true owner.

A wallet containing a sum of money, found upon the floor of a shop, was handed to the shopkeeper to be returned to the owner. At the expiration of three years, the owner of the wallet not having called for it, the finder demanded its return from the shopkeeper, who refused to deliver it upon the ground that it had been found upon his premises. Upon a suit for recovery the wallet was awarded to the finder, it being held that as against all the world except the owner, the title of the finder was perfect. (11 Jur. 1079.)

§ 151. **Bailments for the bailee's benefit.**—A bailee is obliged to exercise extraordinary or the utmost degree of care and diligence when the bailment is for his sole benefit; he is liable to the bailor for losses resulting from the slightest negligence. Bailments under this classification occur when property has been lent to the bailee without giving any compensation or benefit in return, as the neighborly loan of a book. The borrower must be extremely careful of the thing borrowed, make no other use of it than that for which it was lent; he must not lend it to anyone else, but if so lent, the first bailee will be liable even though the second borrower used

great care. Upon the accomplishment of the object for which the loan was made, the property is to be returned to the bailor.

The bailee must take greater care of property borrowed than if it were his own and bear all ordinary expenses in connection with its use, but he should be reimbursed for any extraordinary expenses which were not made necessary by the use of the property, but were incurred in its preservation. The bailee is not liable for loss resulting or damages caused by inevitable accidents,[1] the act of God, or the public enemy, provided the bailee was not at fault, or could not have prevented the loss. However, he might make himself liable, by special agreement, for any loss, regardless of how it occurred.

§ 152. **Bailments for the benefit of the bailor and bailee.**— Bailments for the mutual benefit of the bailor and the bailee are of common occurrence in the commercial world. A delivers his watch to B to be repaired. The bailee receives pay for his work, the bailor receives back his watch in a more valuable condition. Therefore, both parties derive benefit, profit, or convenience from such transactions. The bailee, receiving compensation, is required to take greater care than that demanded of the bailee when he serves without pay, and less than that of the gratuitous borrower. Therefore, in this class, the bailee is held to ordinary diligence or care, and is consequently liable only for loss or injury occasioned by lack of ordinary care, which is called ordinary negligence. Of course, property of great value, or that which might be easily destroyed or lost, would require more care than something of little value, or that which could not easily be destroyed or lost. More attention should be given to a watch than a wagon. So what might be proper care in mending a plow might be the greatest negligence as applied to the repair of a piano.

Mutual benefit bailments include the delivery of goods to a carrier to be transported from one place to another and of hiring and pledging. (See § 161.)

A bailment of hire is created when one rents a piano or typewriter; places a car in a garage; delivers wheat to an elevator, or furniture or other goods to a warehouse for storage; leaves a bicycle or watch for repairs, or goods with a

[1] See § 167 for explanation of these terms.

dressmaker to be made into a garment; or takes cattle to graze or pasture.

Where a person undertakes work and labor on the thing delivered, as goods to be made into clothing, a watch to be repaired, or a gem to be set, it is impliedly understood that the bailee possesses the requisite skill and is bound to use it in the whole of the undertaking, performing his duty in a workmanlike manner. He must also take ordinary care of the property, and is answerable for ordinary neglect. The bailee has a right to undisturbed possession of the property until the work is finished, when he has a right to his pay; and until he receives the pay, he is entitled to a lien upon the chattel for his services. If the material delivered should be destroyed, without the fault or neglect of the workman, and before the work upon it is completed, the laborer would be entitled to compensation for the amount of work actually done.

Upon the termination of the bailment contract, it is the duty of the bailee to return the identical property to the bailor or his agent, together with all natural accessions to the property; as, for example, an animal's offspring, born during the time the bailment was in effect.

§ 153. **Warehouseman.**—A common example of a mutual benefit bailment is where goods are placed in a warehouse. A warehouseman is one lawfully engaged in the business of storing goods for profit. In some states it is necessary to secure a license from the authorities before engaging in this business; and the duties and liabilities of such persons are prescribed by statutes.

A private warehouseman may select his customers and accept goods for storage from whomever he chooses. He may issue a "warehouse receipt" for the goods received by him; such a receipt must contain a description of the goods, give the location of the warehouse, rate of storage charges, and date of issue, and state to whom the goods will be delivered, together with a statement of any lien the warehouseman may have on the particular property stored. This receipt may be negotiable in character, which will permit the holder to transfer it by indorsement so as to give the indorsee the right to claim the goods, under certain conditions, upon the presenta-

tion of the receipt. This is a common practice where grain is stored.

A warehouseman who isues a negotiable receipt, knowing that the goods for which the receipt is issued have not been actually received, or are not actually under his control at the time of issuing, or knowing that the receipt contains a false statement, is guilty of a criminal offense and can be punished accordingly.

A warehouseman will be held liable for any loss or injury to the goods, caused by his failure to employ such care as a reasonably careful owner of similar goods would exercise; he does not become the insurer except by special arrangements.

The goods must be kept separate from the goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, unless otherwise authorized by agreement or custom. If he mixes the goods with his own, he will suffer the loss and inconvenience, if any should arise, even to the extent of losing his own goods entirely. If authorized by custom or agreement to mingle certain kinds, as grain of the same kind and grade, or similar merchandise, then the depositors would own the entire mass in common, and each one would be entitled to such portion as the amount he deposited would bear to the whole amount; and the warehouseman is liable to each depositor for each one's share under the same circumstances as if the goods had been kept separate.

After all proper charges have been paid, the owner is entitled to the return of his specific goods, or for his share where they have been commingled, according to agreement or custom. On the other hand, the warehouseman has a lien on the goods deposited for all lawful charges for storage, money advanced, and cost of sale where default has been made.

§ 154. **Pledged property.**—Personal property, deposited as security for some debt or obligation, with power to sell upon the failure of the person depositing to keep his engagement, is termed a *pledge*. The word "pawn" is applied in ordinary business usage to dealings with a class called "pawnbrokers," who lend money on goods deposited with them as security for the payment of a debt. The statutes prescribe the amount of

interest they may charge, and their duties and liabilities. In commercial or financial transactions, stocks, bonds, bills, notes, and like instruments, deposited as a pledge, are termed "collateral securities." A vast amount of the money lent by banks is secured by commercial paper of this kind.

The parties to a pledge must be competent to contract. The one delivering the property is called the *pledgor* while the one to whom the delivery is made is called the *pledgee*. The pledgee must take ordinary care in keeping and preserving the pledged property, and is answerable for ordinary negligence. If the debt is not paid when due, the property may be sold and the proceeds used to satisfy the debt.

Doe pledged his watch with Roe as security for a debt. Roe left the watch at night in a show case. Burglars entered the store and stole the watch. Roe would be liable to Doe if it was proved that Roe had not exercised the proper care in protection of the watch.

Allen lent money to Dubois, taking the latter's note, secured by pledge of certificates of certain shares of stock of the Iron Silver Mining Company. Allen sold these particular shares, but was ready at all times to acount for similar shares for like amounts. Allen demanded payment of the note and tendered Dubois these similar shares. At the time the shares pledged were sold, the price was up; at the time payment on the note was demanded, the price was down. The court held that Dubois could demand his identical certificates, and if they were not produced, Allen must account for their value at the time of their sale. The difference in price was sufficient to cancel Dubois' indebtedness, and give him judgment for an additional sum. (75 N. W. 443.)

QUESTIONS FOR DISCUSSION
(Oral)

1. The Hendersons left their furs with a neighbor before leaving for Florida. The neighbors made no charge for the keeping. The furs were left in an open box in the bedroom. Spotty, the house dog, crawled into this box for his nightly rest. Is this a violation of the bailment contract?

2. If the furs left by the Hendersons, and kept for them gratuitously by the neighbors, were placed in a box and set upon a top shelf in the wardrobe, what would be the liability of the neighbors if they became moth-eaten?

3. A motorist found a valuable violin in the road, where it had fallen out of a passing car. The motorist strapped the

violin to the rack of the running board, and left it there all night in the rain. The rightful owner claims the violin and sues the motorist for damages. Result?

4. Langford borrowed his neighbor's wheelbarrow. He left it under a tree in his back yard. It was stolen during the night. What is Langford's liability?

5. Kane borrowed a bicycle from Jones. Without the owner's knowledge, Kane permitted Lester to use it. Lester, exercising great care, was run down by a motorist, destroying the bicycle. To whom will Jones look for payment of the injury to his wheel?

6. Brown borrowed a typewriter from Adams. Young borrowed it from Brown. Young refused to deliver it back to Brown, claiming the machine belonged to Adams. Must Young redeliver it to Brown?

7. A jeweler was repairing Smith's watch, when a customer entered to look at some rings. The jeweler put the watch and his tools on the counter and proceeded to wait on the customer. When he returned the watch had disappeared. Who suffers the loss?

8. The steering gear of a car, which Daniels rented to a salesman, was broken. The salesman suffered injuries when the car was wrecked. Daniels claimed he had no knowledge of the defect. Is he liable for the injury?

9. A motorist left his car in a garage to be cared for overnight. During the night the car and the garage were destroyed by fire. Is the owner of the garage liable for the loss of the car? What, if anything, must he show to relieve himself from liability?

10. A student found a valuable watch. He took it to a jeweler to have it cleaned. A burglar robbed the jeweler, stole the watch and pledged it to a pawnbroker. At the expiration of the pledge, the pawnbroker sold the watch to Stillings. The rightful owner now claims the watch. What are the rights of each party?

CASE PROBLEMS
(Written or Oral)

No. 162

Cole, a minor, receives a deposit of cash for safe-keeping from another minor. Cole spends the money for his own pleasure. Is Cole liable under the contract of bailment? (14 R. C. L. 262.)

No. 163

A salesman hired an automobile from a Drive-it-yourself garage to go to Hudson and return. He drove to Hudson and then started to go to Albany. On his way to Albany, and without any fault or negligence on his part, the salesman collided with another car driven by a drunken chauffeur, and both cars were wrecked. The salesman was using ordinary care and the damage was not caused by his negligence. The garage company sues the salesman for the damage. Who should succeed in this case and why? (53 N. Y. 19.)

No. 164

A customer sent cloth to a dressmaker to be made into a gown. It was intended for a special occasion. Assistants were employed by the dressmaker in doing the work. Through ignorance or carelessness, it was made up with the wrong side out. Would the dressmaker be liable? Explain why. (164 Mass. 537.)

No. 165

The bailor pledged a bond for a loan which he made at the bank. During the interim, two of the attached coupons were detached and cashed by the bank. Is this permissible? (14 Cal. 242.)

No. 166

Valuable jewelry was carelessly left in clothes sent to a cleaner. This jewelry came into the hands of employees of the cleaner without his knowledge or consent. What is the cleaner's liability?

No. 167

Riggs turned over to his country bank for safe-keeping, a small metal box containing $689.90. This was a gratuitous bailment, and the bank had no knowledge of the amount of the contents. Sometime afterwards he asked for the box and it could not be found. Is the bank liable? (200 Pac. 118.)

No. 168

A repaired car was returned to the owner, who failed to pay for the repairs. Sometime later, the car was driven into the garage for oil, by the owner's son. The car was then seized by the garage and held for the repair bill. Does the lien attach? (188 N. Y. S. 782.)

No. 169

Adams laid his pocket book on a table in a barber shop while being shaved. He went away and forgot it. Doe, another customer picked it up and claimed the right to it. Who has the legal claim to the pocket book until the rightful owner can be found? Explain why. (11 Allen, 548.)

Chapter XXIX

HOTELKEEPERS, INNKEEPERS, AND BOARDING-HOUSE KEEPERS

Keep in mind these questions when studying this chapter:

1. **In what respect does an innkeeper differ from a boarding-house keeper?**
2. **What are the general duties and liabilities of an innkeeper?**
3. **Does an innkeeper have special rights? What are they?**
4. **In what respect does a guest differ from a boarder?**

§ 155. **Innkeepers.**—Another illustration of mutual benefit bailments is found in the case of the innkeeper. Innkeepers are usually classified under the title of extraordinary bailees, due to the special rights and duties in respect to their occupation. An innkeeper is a person who keeps open, for profit, an inn, tavern, hotel, or public house, for the lodging and entertainment of transients and travelers. In law, hotelkeepers and innkeepers are the same. The amount of compensation that may be charged is not fixed by law—it is a matter of personal agreement. The one who keeps such a place of business is also called landlord, host, or proprietor.

In early times, the landlord was required to provide for the traveler's horse, as well as for the man, but that is no longer so. The modern hotelkeeper may limit his entertainment to people only. (Many hotels now provide garage accommodation for motorists.) He must, however, undertake to entertain all fit and orderly persons who apply, so far as he has facilities, and who are willing to pay the regular price, which may be demanded in advance. Admission may be denied to those who are drunk, disorderly, or suffering from a contagious or infectious disease, and if they have already entered, they may be ejected. One who occasionally entertains sojourners for a compensation is not considered a hotelkeeper, if he does not represent himself in that character.

If the inn is conducted on what is popularly known as the "European plan," providing lodging with the option of taking

meals elsewhere, it is, nevertheless, an inn. But a restaurant, café, boarding-house, lodging-house, or coffee-shop is not an inn.

Steamship and sleeping car companies have been held not to be innkeepers. They do not accommodate persons indiscriminately—nor does the latter serve meals.

In the case of Pullman Palace Car Co. vs. Smith, 73, Ill. 360, the Pullman Company was held not liable for money stolen from a passenger while an occupant of one of their cars. A passenger's contract is with the railroad company for transportation, hence the Pullman company would not be liable as a common carrier.

§ 156. **Guests and boarders.**—A person who stays at an inn or hotel, without reference to the length of his stay, so long as he retains his character as a transient or traveler, is termed a guest. But if one stays for a fixed period, at a certain agreed rate, he is a boarder. The wayfarer may even make special arrangements for accommodations by the week or month and still be a guest.

To be a transient, it is not necessary that one must reside in some other locality than where the inn is located. The attending of a ball or reception, given on the premises, or the depositing of goods for safe-keeping does not constitute one a guest. These various distinctions are essential in order to understand the proprietor's liability and the guest's privileges, in comparison with those due persons who are merely boarders.

Just when the relation of host and guest begins is sometimes an important question. It may be said that the moment a traveler is accepted he becomes a guest, and the length of his stay makes no difference, so long as it is not his intention to remain permanently. In a leading case, it was decided that a traveler became a guest upon the handing of his baggage check to the hotel porter at the railway station.

In many instances, the proprietor may be both an innkeeper and a boarding-house keeper. It is not uncommon for an inn or hotel to be conducted as a boarding-house for those who reside there permanently. The transient guest may become a permanent boarder.

Bullock kept a European hotel with café accommodations. Mrs. Adair lodged in the hotel and ate at the café for one week. Later she returned and lodged in the hotel but did not patronize the café. This time she remained three weeks. On December 24 she returned again and

lodged until sometime in April. On March 6 her cloak was stolen, through no fault of hers. She sued the landlord and recovered damages for the loss of the coat. The court held that, though she rented the room by the week for more than three months, she was nevertheless a transient and entitled to be protected as such. (63 Ill. App. 30.)

§ 157. **Duties and liabilities of an innkeeper.**—An innkeeper, being engaged in a public calling, it is his duty to receive all fit persons who apply—if he has room—and a refusal without just cause makes him liable for damages. He cannot discriminate as to whom he will take or refuse, as a guest, because he applies on Sunday or late at night; but the guest cannot demand particular rooms, nor meal service except at regular hours.

The responsibility of an innkeeper is greater than that of an ordinary bailee; he is bound to take extraordinary care of the person of the guest, of his family and servants, as well as of his property; he must protect the guest from the assault of the servants; he is an insurer of the property of the guest and is liable for its loss, even where it arises from a fire, burglary, theft, or robbery, whether by a servant, stranger, or a fellow guest. The innkeeper is not liable for goods stolen from a neighbor, who is not a traveler, but is lodging at the inn as a friend of the landlord—and gratuitously.

The guest must observe any reasonable rules or regulations made by the innkeeper for safe-guarding property. A failure to obey these requirements relieves the innkeeper from liability, except for ordinary care. The statutes may provide for the posting of notices informing the patrons that all money and other valuables must be deposited for safe-keeping, and a failure to do so will relieve the innkeeper, except for losses resulting from his negligence. In some states, the mere posting of the notice is not sufficient; it must be shown to have been personally brought to the knowledge of the guest.

§ 158. **Innkeeper's rights.**—The landlord has a right to demand his pay in advance; he is not bound to entertain a guest who refuses to pay lawful charges. If the landlord does not exercise his privilege of collecting in advance, he has a lien on the goods and baggage of the guest for his board and lodging, and may retain them until the account is paid; but he has no right to retain the person of the guest. The statutes

ordinarily provide the right to sell the property to satisfy the debt and to return the remainder to the delinquent guest.

§ 159. **Boarding-house keeper.**—A boarding-house differs from an inn or hotel in several respects. The employment not being of a public character, the proprietor is not obliged to accept all fit persons who apply, but may select whomever he pleases. In the absence of statutory provisions, he has no lien on the baggage of the boarder, nor is he liable for losses arising through fire, theft, or robbery—but is held liable merely as an ordinary bailee.

The wife and children of the plaintiff, after living for some years in St. Paul, took board at a hotel in that city. The husband resided in another state, but frequently visited them. During one of these visits, the husband's baggage and the baggage of the wife and children were stolen. It was held that the hotelkeeper was liable for what was brought to the hotel by the husband, but not for that brought by the wife and children. (22 Minn. 468.)

QUESTIONS FOR DISCUSSION
(Oral)

1. A farmer living along a busy highway has taken in more than fifty sojourners during the past two years. Does this business as a side-line constitute him an innkeeper?

2. Brown has placed an electrically-lighted sign in his front yard which reads: "Transients welcome. Accommodations 50c —$1.50." Is he an innkeeper?

3. A tramp, accompanied by an infectious disease, insists on getting a room in the basement of the "Wayne Hotel." He is refused and brings suit. The result?

4. A number of college students apply for lodging at a hotel, after a football game. Less than a year previous, a similar group of students demolished all the furniture in the rooms they occupied in this hotel. The present applicants are refused. Have they a right of action against the owner of the hotel?

5. A traveling salesman stopped at the Continental hotel three days each week for a year. He made special arrange-

ments for accommodations. The same room was reserved for him. Is he a guest or a boarder?

6. A guest and his baggage were locked in his room by the innkeeper because the guest refused to pay his board and lodging. What are the rights of the respective parties?

7. A guest at the hotel complained about the stubborn resistance offered by the "porterhouse steak" set before him. The offended waiter responded by "handing" the guest a "black eye." The hotel is sued for damages. The landlord contends that the waiter was acting without authority, and he was immediately dismissed for his unseeming conduct. Is this a good defense? Why?

8. Can you suggest a reason for the seeming discrimination in the common law which gives to the innkeeper a lien upon the goods and baggage of his guest and denies it to the boarding-house keeper?

CASE PROBLEMS
(Written or Oral)

No. 170

Holohan intrusted his baggage, at the depot, to the porter of a hotel with the intention of coming to the hotel later, and of becoming a guest. But afterwards he changed his mind and stayed elsewhere. Is the hotel an insurer of Holohan's baggage? (79 S. W. 113.)

No. 171

A guest, with the consent of the innkeeper, left the inn before the period for which he had paid. He left his baggage behind until the expiration of the time. The baggage was stolen from the hotel. Can the guest recover? (2 Col. 402.)

No. 172

A rival came to the Popular Hotel for the purpose of drawing away trade and customers. He was refused admission. May he recover in a suit for his rejection? (19 Am. St. Rep. 573.)

Chapter XXX

COMMON CARRIERS

Carriers of Goods

Keep in mind these questions when studying this chapter:

1. **Who are common carriers?**
2. **How are telegraph and telephone companies classified?**
3. **What are the duties of common carriers?**
4. **How does a carrier's lien operate?**
5. **What is the difference between an order and a straight bill of lading?**

§ 160. **Common carriers in general.**—The most important, extensive, and useful contracts of bailment are undoubtedly those pertaining to common carriers. Their business being of a public nature, they are controlled by more stringent rules of law, and are subjected to a higher degree of liability, than attaches to an ordinary bailee; it is even greater today than that of an innkeeper.

The most specific example of common carrier is that of a railroad or express company; but the following classes of persons, among others, also have been expressly decided to be such: ferrymen, hackmen, stage-coach proprietors, canal-boatmen, city transfer companies, dispatch freight lines, steamboat companies, and many others who engage in the business of transportation for hire.

§ 161. **Who are common carriers?**—A common carrier is a person or company, undertaking to transport over his route, either or both the goods and person of anyone who may desire to employ him for that purpose. A transportation company engaged in the carriage of freight is a common carrier, although it may have no road of its own. The calling is distinctly that of regular public employment, not as an occasional occupation, the carrier serving all persons indiscriminately, for a compensation, to the extent of its facilities, and a refusal makes the carrier liable for damages. The one who ships goods, the shipper, is known as the *consignor;* the one to whom the goods are sent is known as the *consignee.*

A private carrier is one who transports personal property, for others, in special cases, under private contract. It is not engaged in the busi-

ness as a public calling and may, therefore, carry for anyone it pleases. It is bound to use only ordinary care and reasonable skill; it does not insure the goods against loss except through the negligence of itself or employees.

§ 162. **Telegraph and telephone companies.**—Telegraph and telephone companies are regarded as public servants and under public regulation and control. They must serve the public without discrimination, and treat all customers alike. To this end, they are obliged to receive, send, and deliver all lawful messages indiscriminately for anyone who may desire to employ them and pay the charges exacted, which must be reasonable. The same general rules governing telegraph companies also apply to telephone companies.

A telephone company may make reasonable regulations for the conduct of its business, and deny the right to use its instruments to those who violate these rules.

§ 163. **Not common carriers.**—Such companies are not common carriers. The courts at first sought to hold them liable, but in the absence of statutory provisions imposing the liabilities of common carriers, they are not so regarded. They are not bailees, nor do they insure the accuracy and prompt delivery of messages. They must use reasonable dispatch in forwarding messages, but are responsible only for negligence or wilful default in a failure to transmit correctly or to deliver the messages. They must deliver the message within a reasonable time, whether informed of their special importance or not. They may, for an extra charge, become insurers. They usually stipulate that, unless the message is repeated at the expense of the sender, they are exempt from liabilities, or at the most assume a very limited liability.

§ 164. **Duties.**—It is the duty of a common carrier to accept such goods as come within its line of business—to the extent of his capacity—take proper care of them from the moment they are received, and comply with the reasonable directions of the owner in respect to them. The goods must be placed in the exclusive custody of the carrier or its agent. Where it is the custom or usage to permit the shipper to place them on the platform at the station, such delivery is sufficient. If the goods are improperly packed, dangerous to life or property, or otherwise unfit for shipment, they may be refused.

It is also the duty of a common carrier to transport goods safely, by the usual route, to the agreed place of destination, with reasonable dispatch. What would be deemed reasonable depends on the nature of the goods—stock or fruit would obviously require different treatment from iron, iron ore, or cotton. If demanded by the carrier, the payment of the charges may be exacted in advance. If the service desired is unusual, compensation accordingly may be collected. However, each shipper must be charged alike for like service—there must be no discrimination in rates. This does not prevent the making of a lower charge for a larger contract; or a proportionately lower price for what is termed a "long haul" than for a "short haul."

It is the further duty of a common carrier to deliver the goods to the right person at the proper time and place. In the case of railroads or vessels, the delivery is made at the freight depot or wharf.

§ 165. **Carrier's lien.**—If the carrier has not been paid in advance, he has a lien on the goods carried for his charges and for any money advanced to connecting lines, and he may retain possession of them until paid. After the goods are delivered, the right of lien ceases to exist. If a part of the goods has been delivered, the remaining portion may be retained until the charges have been paid. Under the common law, the carrier had no right to sell the goods to satisfy his claims, but the statutes of most of the states have changed that rule, and the right to sell, after a reasonable time has elapsed, now exists.

§ 166. **Bill of lading.**—The shipper should require a receipt from the carrier, for goods delivered for transportation, for evidence in case of loss. This receipt, when issued by a railroad, is called a bill of lading.[1] It is also a contract by the carrier to transport the goods and deliver them to a designated person

[1] Practically all of the railroad companies do business in more than one state, hence are under the jurisdiction of the Interstate Commerce Commission. This commission has made a ruling that bills of lading should be of a certain size and contain standard regulations. These regulations were determined upon by a joint committee of shippers and carriers, appointed to formulate a suitable bill of lading. This ruling does not prohibit a shipper from preparing his own form, provided it complies with the requirements imposed by the commission.

or to his order. The contract part is governed by the same rules that apply to all other contracts.

Form of Order Bill of Lading

Form 606c. 250M Sets-10-08-E-28421.

For use in connection with the Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 727 of June 27, 1908.

NEW YORK CENTRAL LINES

NEW YORK, NEW HAVEN & HARTFORD Railway Company.

Shippers No. 238

ORDER BILL OF LADING—ORIGINAL.

Agents No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at September 14, 19

from J. A. WHITNEY & COMPANY, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from

to *is in Cents per 100 Lbs.*

If...Times 1st	If 1st Class	If 2d Class	If Rule 25	If 3d Class	If Rule 26	If Rule 28	If 4th Class	If 5th Class	If 6th Class	If Special per	If Special per

(Mail Address—Not for purposes of Delivery)

Consigned to **ORDER OF** J. A. Whitney & Co.,

Destination, Huntsville, State of Arkansas County of Madison

Notify L. Jeffries & Co.,

At 64 Public Square, Huntsville, State of Arkansas County of Madison

Route, Your line. Car Initial Car No.

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
3	brls. New Orleans Molasses,	800#		
1	brl. Corn Syrup,	350#		
5	cases Coffee,	500#		
4	bags Coffee,	542#		
3	bdls. Wrapping Paper,	128½#		
10	cases N. C. Baking Powder,	1105#		
15	brls. Stick Candy,	1604#		

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The Signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

N. Y. N. H. & H. Ry. Co. RECEIVED SEP 14 191 Agent.

J. A. WHITNEY & COMPANY, Shipper.

Per O. K. Calloway

Per Agent.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

QUESTIONS FOR DISCUSSION
(Oral)

1. A shipment of dynamite, poorly packed, is refused by the freight clerk. May he rightfully do so? What are the carrier's rights?

2. An agent gave a shipping receipt which provided for the carriage of goods to the end of the company's line. This receipt was accompanied by an oral agreement that the goods would be sent further, on a connecting line, to their destination. Is the first company liable for a loss on the connection line? (34 Hun N. Y. 97.)

3. A Stradivarius violin, valued at $8,000 was crated and sent with household goods by freight. The regular freight rate was charged, the agent being uninformed about the contents. Upon its arrival at destination, the violin was discovered to be seriously damaged. Should the owner be permitted to recover?

4. A millionaire took his porch furniture to the station for shipment to Florida for the winter. The railroad company demanded that the freight be prepaid, to which the shipper replied that his credit was good, and refused to pay. Must the carrier take his furniture and collect on delivery?

5. A railroad compay refuses to surrender a shipment of goods unless $10.50 freight and $4.75 storage is paid by the consignee. Is the company entitled to a lien covering both charges? (199 Mass. 586.)

6. Freight on goods delivered to Brown June 1 is unpaid. Charges were $10. A subsequent shipment arrived July 1, charges $12. Brown tenders payment of $12, charges on second shipment, but the carrier withholds delivery until he is paid $22. What are Brown's rights? (73 Kans. 295.)

7. Peaches were shipped from Michigan to Kentucky. They were en route three weeks, and consequently were damaged. Can the shipper collect damages? Would your answer be the same if the shipment had been potatoes?

8. Ripe watermelons were shipped from Texas to Missouri. There was no delay in the shipment. When the melons arrived at their destination they were spoiled. What is the carrier's liability?

9. Williams ordered a dining room suite from a mail order house. The railroad company sent a notice to the consignee's address soon after the arrival of the furniture. Williams, who was away on a month's vacation, found the notice in his mail upon his return. In the meantime the furniture had been stolen through no fault of the shipper. What is the duty of the railroad company?

10. Dobbin's goods were set on the station platform after he had surrendered the bill of lading. Dobbin left word that he would return in a half hour with his truck to call for the goods. They were accidentally destroyed before he returned. What is the duty of the carrier in this regard?

CASE PROBLEMS
(Written or Oral)

No. 173

Baker shipped a box of books to himself. The railroad company gave him personal notice of their arrival, but Baker did not call for the books, and they remained in the depot sixty days, when they were stolen. The company used ordinary care to prevent loss by theft, but did not use all the means it might have resorted to. Is the company liable as a common carrier or as a warehouseman?

No. 174

Allen shipped goods via the Illinois Central Railroad, from Bloomsburg, Illinois, to Columbus, Ohio. The freight was prepaid. The Illinois Central delivered the goods to the Terra Haute & Alton Railroad Company at Pana. They were damaged in transit after the delivery at Pana. Allen sued the Illinois Central Railroad for the loss. Which company should Allen seek to hold liable? (54 Ill. 88.)

No. 175

Roe & Company, Boston, shipped a carload of drygoods to Spencer Bros., Omaha. The freight was not prepaid and the railroad company refused to deliver the goods until Spencer Bros. paid the charges. To what extent does the carrier have a right (a lien) on the goods for the charges?

No. 176

A valuable package was sent by express to J. C. Brown, Toledo. There are two persons of that name in Toledo. The package was delivered to the wrong Mr. Brown. What is the responsibility of the express company in this regard?

No. 177

Property had been delivered on a spur track to the consignee, and he accepted it. The consignee removed part of the goods, and placed his own lock on the car. A fire destroyed the car and the remaining goods. Was there any special obligation or duty on the part of the railroad to this property? (27 R. I. 235.)

No. 178

A negotiable bill of lading, indorsed in blank, got into the hands of a thief who wrongfully obtained possession of the goods from the carrier. The real owner thinks he has a just claim against the railroad company for the price of the goods. How do you think a court should decide this question? (86 Ky. 176.)

No. 179

Mr. X was the consignee of a shipment consisting of two stoves, one lawnmower, three ladders, and twelve shovels. The freight agent delivered the lawnmower and shovels to Mr. X but held the ladders and stoves for the unpaid freight charges. A carrier has a lien on the goods for freight charges. The question here is whether a part delivery before the charges are paid is a surrender of the lien. How would you settle this question? (138 Mass. 340.)

Chapter XXXI

CARRIER'S LIABILITIES

Keep these questions in mind when studying this chapter:

1. **When may a carrier be relieved from liability?**
2. **How can a carrier limit its common law liability?**
3. **When and how does a common carrier's liability end?**
4. **In what other ways may a carrier be relieved from liability?**
5. **What are some of the requirements of the Interstate Commerce Act?**

§ 167. **Carrier's liabilities.**—A common carrier is generally regarded, in the absence of a special contract, statutory regulation, or custom limiting such liability, as an insurer of the property in its care during transit, against all loss or damage occurring in any manner, unless the same is caused:

(1) By the act of God.
(2) By the public enemy.
(3) By the fault of the shipper.
(4) By the inherent nature of the property.
(5) By the intervention of public authority.

The rules, imposing the severe responsibility of an insurer upon a carrier of goods for the public, originated in early times, when the carrier had exceptional opportunities for personally appropriating the goods placed in his care for transportation, or for defrauding the owner through connivance or collusion with thieves or pirates. This gave rise to the rule holding him absolutely responsible for all loss or damage except that caused by the act of God or the "King's enemies" (that is, public enemies) because these losses could easily be proved or disproved. It was thought that in no other way could fidelity be assured. In modern times, the necessity for this strict liability is not so great, and the additional exceptions mentioned have been added to those just specified, for the protection of the public.

Goods held by a common carrier, previous to the duty of shipment, and after the obligation to transport the property

is ended, are held by the common carrier in the capacity of a warehouseman, and with corresponding liability.

(1) *The act of God.*—By the act of God is meant any accident produced by physical causes which human ability could not have foreseen or prevented; it is something which human power cannot prevent nor human prudence avert. Earthquakes, extraordinary and unprecedented floods, tornadoes, sudden sickness or death, and the like are acts that will excuse the carrier for loss or damage to goods in his possession. He would be excused from liabilities where goods are destroyed by fire caused by lightning, but not where the fire was started by a human being. If the negligence of the carrier contributed to the loss, or if he deviated from his agreement or instructions, he will be held liable even though the proximate cause of the loss is due to the act of God.

The Mississippi floods in 1927, the Johnstown flood, the San Francisco earthquake, and the losses by fire resulting thereby, were acts of God, and excused the carrier from liability. But the great Chicago fire was not considered an act of God and, consequently, the carrier could not offer that occurrence as an excuse.

Defendant agreed to send goods by one line of boats but sent them by another. He was held liable for loss to the goods caused by lightning striking the boat. (70 Am. Dec. 69.)

A ferryman attempted to cross a river while a dangerous wind was blowing; the goods were damaged by the wind storm and the ferryman was held responsible for the loss, due to his negligence. (Harp. 470.)

If a carrier should allow a car to remain on a siding an unreasonably long time, when with due care it could have been moved out of the danger zone, the loss is attributed to the negligence of the carrier, and it would therefore be held responsible for damages. (30 N. Y. 630.)

(2) *The public enemy.*—A common carrier is exempt from responsibility as an insurer for loss or damage to the goods in its charge caused by an act of the public enemy, when the encounter could not have been avoided. The carrier must use at least ordinary care to prevent the goods in its custody from falling into the hands of, or being destroyed by, the public enemy. By the phrase, public enemy, is meant an organized force with whom the nation is at open war, and pirates on the high seas. Mobs, robbers, highwaymen, or strikers, however numerous they may be, are never included in this class as public enemies; and losses resulting from the latter will not excuse the carrier as an insurer.

(3) *The fault of the shipper.*—If the goods are lost or damaged through the fault, fraud, or folly of the shipper, the carrier is not liable as an insurer. The goods must be properly packed and addressed, and the carrier advised as to the nature of the contents or value, so that proper precautions may be taken to protect them. It must also be informed if they are of extraordinary value, so that corresponding care may be taken and a rate charged proportionate to the risk.

A shipper delivered to a railway company a bundle that appeared to be bedding. The bundle, however, contained valuable silks and furs which required a higher freight rate. This was an attempt, apparently, to defraud the carrier. The court held that the carrier was not liable for the loss. (66 Ill. 548.)

(4) *The inherent nature of the property.*—If loss or damage arises through the inherent nature, defect, infirmity, or vice of the property carried, or its natural wear and tear in transportation, without the fault or negligence of the carrier, the latter will not be liable as an insurer.

The foregoing exception applies to the decay of fruits, vegetables, and other perishable commodities; the evaporation and fermentation, or unavoidable leakage of liquids; and the spontaneous combustion of certain kinds of goods. It also includes injuries done by animals to themselves, and each other, by reason of their vices and vicious propensities. The transportation of animals is not subject to precisely the same rules as that of packages and inanimate articles. The carrier must feed, water and otherwise take care of the live stock on the way, unless the owner accompanies it for that purpose, and even then suitable facilities and opportunity for doing so must be furnished.

The carrier is bound to take reasonable means to guard against injuries. He must use special diligence to avoid delay in transporting perishable goods. The carrier must also take notice of any marks upon the package containing the goods which indicate the character of its contents.

(5) *The intervention of public authority.*—The carrier is not liable, as an insurer, for any loss or damage arising through the intervention of public authority, as where property is taken away from him by a judicial process, or infected goods are destroyed by a public health officer. The carrier, to avoid responsibility, must immediately give the owner notice of the seizure.

§ 168. **Limitation of liability.**—Unless the statutes forbid, a common carrier may, by a just and reasonable contract with the shipper, be relieved from the common law liability as an

insurer. Such agreements may stipulate against liability for loss caused by fire, theft, delays arising from mobs, strikers, accidents, and the like. The consideration for making such contracts is the lower rate of transportation charged. If a shipper requests and receives a certain service, he should pay the rate scheduled for that service.

While it is true that the carrier may enter into a contract limiting its liability, it is equally well established that he cannot relieve himself by special contract, or otherwise, from responsibility for loss or damage arising through fraud, misconduct, or negligence of himself or employees.

The carrier may require that claims for loss or damage must be presented for adjustment within a specified but reasonable time. He may also stipulate the amount for which he will be liable in case of loss, unless the customer gives the true value of the goods to be shipped, in which case he would have a right to make his charges accordingly.

§ 169. **Termination of liability.**—The liability of a common carrier as an insurer ends:

(1) When the goods are delivered to the consignee.
(2) If the consignee does not call for them within a reasonable time after receiving notice.
(3) Upon their delivery to a connecting line.
(4) When the consignor exercises the right of *stoppage in transitu.*

(1) *Delivery.*—It is the duty of the carrier to deliver the goods, unless prevented by the exceptions previously noted. The delivery must be made to the proper person and place in a reasonable time and manner. A wrong delivery, through the mistake of the carrier, or on a forged order, or through the fraud of others, and not as the result of negligence, fraud, or default of the owner, will cause the carrier to be liable for the value of the property. The delivery must be to the right person or his authorized agent.

The proper place for making the delivery depends upon usage and custom. Formerly, when freight was moved by teams, it was the custom to deliver at the residence or place of business of the consignee. This is still the duty of express companies in cities. Freight shipped by railroad is delivered at the freight depot or warehouse.

The delivery must be made at a reasonable time. The consignee is not required to take the goods away on Sunday or a legal holiday. The carrier must use diligence in getting the

goods promptly to their destination. If the contract calls for them to be delivered in a specified time, he will be held strictly to the terms of the agreement.

(2) *Notice to consignee.*—In a few of the states, the carrier is not required to notify the consignee of the arrival of the goods, while in others this notification must be given. If the owner fails to call within a reasonable time after the receipt of a notice, the carrier's liability as an insurer ceases and he becomes liable as a warehouseman.

(3) *Delivery to connecting line.*—It frequently happens that goods are sent to a certain place which requires forwarding them over several different lines. The first carrier delivers them to a second carrier, and it to another until they reach their point of destination. It is well to know that, if a carrier accepts goods to be shipped beyond the end of its line, its liability as an insurer ceases when the goods are safely delivered to the next connecting carrier. Of course, the carrier may enter into an agreement to be liable until they reach the end of their journey, or such a liability may be implied if it has undertaken to transport them to their final destination; and, to avoid liability, the carrier must show a specific contract to carry only to his own terminus. In some of our states, it is the rule that a carrier accepting goods to be carried beyond the end of his own line is liable for loss occurring upon connecting lines. If injury should occur on a connecting line and the first carrier is not liable under the statutes or by contract, then the shipper must look to the carrier causing the loss or damage. In order to determine when the damage occurred, so as to know which carrier to hold responsible, the carrier in whose hands the goods are found damaged will be held to have caused the injury.

(4) *Stoppage in transitu.*—Whenever a vendor of goods exercises his right of stoppage in transitu, the carrier will be exonerated in making a delivery to the consignor. (See § 136.)

§ 170. **Interstate Commerce Act.**—This is a regulatory law passed by Congress, with a number of amendments thereto. Among other things this Act is intended to prevent, are many unfair practices in vogue with railroad companies. It is an at-

tempt to prevent "pooling," and divisions of receipts; making combinations interfering with the transportation of freight; making a greater charge for a short haul than a long haul over the same route in the same direction; and the giving of special rates and rebates to favored shippers.

This Act also places the liability for all loss or damage on interstate shipments on the first or initial carrier, whose line forms a part of the route over which a shipment passes to its destination. This is so, even though the loss may have been caused by the second or later carriers. Nor can the carrier exempt himself from such liability by contract. Of course the first carrier may hold the offending carrier liable for the loss or damage the initial carrier may have been obliged to pay. Several of the states have also passed such a law affecting intrastate shipments.

(This Act materially affects the common law liability relating to the carrier immediately liable to the consignee in case of loss or damage.)

QUESTIONS FOR DISCUSSION
(Oral)

1. Why is it important to know the liability of a common carrier, and of a warehouseman? Under what circumstances might a common carrier become a warehouseman?

2. In consideration of a reduced rate, the carrier in transporting a carload of horses, was exempted from damages which might occur while "said animals are being loaded or unloaded." May the carrier contract against such liability? (132 Ind. 129.)

3. The shipper specifically agrees with the carrier that the latter shall be exempt from any and all liability. What do you think about such an agreement? (94 Ind. 281.)

4. The driver of your grocer's delivery truck called at the depot for a shipment of books for you. In a collision with a street car, through no fault of the driver, your books were damaged. Is your grocer liable?

5. The carrier was under contract to transport a box of flags to reach Detroit not later than July 3. Due to a strike

and shortage of labor, the flags did not reach their destination until July 5. Is the carrier liable?

6. It was impossible for the engineer of a train, going at the rate of twenty miles an hour, to stop in time to avoid a rapidly moving tornado, which damaged the cars and much merchandise. Is the railroad company liable for the loss of the merchandise?

7. Despite every precaution used by the carrier, strikers succeeded in wrecking a fast express train. The express company did not own the road over which it operated. Nevertheless, is it liable for the damage to the merchandise?

8. Household goods are being moved by a bus transportation company. Where must delivery be made?

9. Enroute to the stockyards, a train load of cattle passed over a bridge high above the water. The shock caused by this sensation proved fatal to several of the animals. Is the railroad company liable?

10. A government official halted a train and removed all diseased animals and ordered them killed. What is the liability of the railroad company in this regard?

CASE PROBLEMS
(Written or Oral)

No. 180

The Shaw Transfer Co. was engaged in the business of hauling goods. Murphy hired the transfer company to take some furniture from the depot to his house. On the way, the wagon was run into by a street car and the furniture damaged. Neither the transfer company nor the driver was negligent; the conductor of the street car was wholly to blame for the accident. Who is liable to Murphy for the damage?

No. 181

A wholesale merchant delivered a carload of goods to a common carrier in the city of Boston, to be conveyed and delivered at Milwaukee, Wisconsin, for which service he was to pay the carrier $250. The carload of goods, after it reached

Milwaukee, but before it was delivered, was, without the fault of the carrier, destroyed by an act of God. Can the carrier recover the freight charges?

No. 182

A grain dealer loaded a car of wheat for shipment and the railroad company issued the proper bill of lading. On account of the lack of motive power, the car remained for five days before it was moved. By reason of this delay the grain was destroyed by causes which came clearly within "an act of God." If the car had been moved within three days, it would not have been destroyed. Is the railroad company nevertheless liable? (75 Kans. 222.)

No. 183

Furniture is shipped from Dallas to Waco. The train is derailed by train wreckers who steal part of the furniture. The owner of the goods sues the railroad company for the loss. To what extent is the carrier liable?

No. 184

The railroad company on which Gordon's goods were shipped had the best equipment. The engine was provided with the best spark arrester on the market, and was operated by a skillful engineer. Does this exempt the carrier from liability for destruction of goods by fire communicated by a spark from the engine? (85 S. W. 479.)

No. 185

Due to the reckless running of a train around a sharp curve, cars were derailed and much merchandise destroyed. The railroad company sought to excuse liability by proving that the engineer was in a state of insanity at the time of the accident, which they regarded as an "act of God." Do you think the railroad company should be excused? (124 Ga. 322.)

No. 186

A shipper chose to ship butter in a box car in the month of April in the expectation that the weather would remain cold. It suddenly turned so warm as to cause injury to the butter. Is the railroad company liable? (7 Dom. L. R. 901.)

Chapter XXXII

PUBLIC CARRIERS OF PASSENGERS

Keep in mind these questions when studying this chapter:

1. **Who are public carriers of passengers?**
2. **When is one considered a passenger?**
3. **What are the rights and liabilities of carriers of passengers?**
4. **What constitutes baggage?**

§ 171. **Who are public carriers?**—A public carrier of passengers is one who undertakes, for a compensation, to carry all persons alike who may desire passage. It is bound to accept and carry only fit and proper persons and not those who are disorderly or who may have an infectious or contagious disease. The general principles of law governing common carriers of goods apply to public carriers of passengers, with this difference, however, that the carriers of persons are under a more limited liability, they are not bailees of the passengers they carry. A person is not entirely under the control of the carrier; he can care for himself. The carrier of goods has unlimited control of them, and their safety depends upon the care he gives them.

Common examples of carriers of passengers are railroads, street railways, steamboats, hacks, busses, taxicabs, ships, etc., and all other means of transportation that profess to carry, as public employment service, all who apply.

§ 172. **Who are passengers.**—It is essential to know who are entitled to the rights and privileges of passengers. We learn that a passenger is a person entitled to travel in some established public conveyance. This includes those who travel on a pass, or who have not yet paid their fare and have no intention of evading the payment, as well as those who have paid their fare. Those who, through fraud or false representations, ride without paying their fare are not considered passengers. The relation of carrier and passenger begins the moment one enters the premises of the carrier to take passage

and continues until he leaves the conveyance and premises after arriving at the end of the journey.

During the World's Fair, in Chicago, the Illinois Central Railway Company operated local trains from the down-town district to the fair grounds. Passengers were obliged to buy tickets, pass through turnstiles and deposit their tickets. The company erected a platform from which the passengers entered the cars through open doors in the side of the cars. There was an opening between the cars and the platform. A passenger, attempting to get on a train, fell into this opening and was injured. The passenger brought suit for damages, the railroad maintaining she was not a passenger at the time, and therefore not entitled to the care to which a passenger was entitled. It was held that: One who purchases a ticket and is in the place provided for passengers, and is waiting, or is about to enter the carriage, is a passenger, and the carrier owes a high degree of care to prevent such person being injured. (179 Ill. 576.)

A passenger is entitled to a seat and need not surrender his ticket until he is given one. But if no seat is to be had he cannot ride free. He must either pay his fare or leave the train at the first stopping place. He may then sue the carrier for a breach of contract.

Public carriers of passengers are not obliged to carry passengers on freight trains unless they have, by custom, held themselves out as such carriers.

The carrier need not carry those who, because of lack of physical ability, may be likely to need more than ordinary care and attention, or are quite helpless.

Reasonable accommodations necessary for the comfort and welfare of the passengers must be provided. If the journey is of great length, opportunity to procure food must be offered.

§ 173. **Rights and liabilities.**—A public carrier of passengers has the right to demand the payment of fare in advance. It likewise may refuse to carry those who will not pay their fare or purchase a ticket. The fare charged must be reasonable. Most of the states regulate by statute the amount that may be charged. The carrier may make reasonable rules and regulations for conducting the business and for the comfort and protection of the passengers and their property. He may also require passengers to show their tickets before entering the train, to remain upon the car until it stops, and to keep off the platform. It would be an unreasonable requirement that every passenger keep his seat during the entire journey.

The liability of a carrier of passengers is not so extensive

as that of a carrier of goods. Nevertheless, the carrier is still under a strict and extreme responsibility for the safety of the persons carried. While he is not an insurer of their safety —a railroad ticket is not an insurance policy—he is liable for any injuries which could possibly have been avoided and must take precaution for protecting "life and limb," and will be held liable for slight neglect. This liability includes the acts of the carrier's servants, it being liable for any injuries they may inflict upon travelers. The carrier must also use diligence and care in protecting passengers from the violence of fellow travelers and strangers. If a passenger is injured through his own negligence, or where his negligence contributes to it, he cannot recover damages from the carrier.

One is presumed to be able to take care of himself while on a journey. The carrier does not have the same control over a traveler as over goods —the passenger can not be stowed away like a box of freight or locked up in a safe like a valuable express package.

§ 174. **Baggage.**—The term *baggage* is generally held to mean the articles of necessity, comfort, or convenience, which a traveler takes with him on a journey for his personal use. It includes wearing apparel, money needed for traveling expenses, jewelry intended to be worn, fishing tackle and appliances of those on a hunting or fishing trip, etc., but not merchandise, or articles carried for business, trade, presents, or property belonging to other persons.

A conveyance of baggage is a necessity incident to the transportation of passengers. In consideration of the price paid for fare, the carrier is obliged to receive and carry a reasonable amount of baggage, as well as the passenger. And the carrier is liable for the protection, as an insurer, at common law, against all loss or damage unless caused by the act of God, the public enemy, or the fault of the passenger. This liability does not extend to goods or baggage not delivered to the carrier and which the passenger keeps in his own control.

The plaintiff checked his trunk as baggage. This trunk contained valuable merchandise in the form of a stock of jewelry from a retail store. The trunk was destroyed by fire while in the baggage car. This loss was not caused through the fault of the plaintiff. In a suit for damages the railroad company was held not liable. The court held that baggage must consist only of articles ordinarily needed by the passenger on a trip for his own personal use. (73 Ill. 348.)

QUESTIONS FOR DISCUSSION
(Oral)

1. How do you account for the fact that the liability of a carrier of passengers is not as extensive as the liability of a carrier of goods?

2. A lumber company operated an engine and a flat car to haul lumber and transport its employees to and from their work. Is the company a public carrier? Are the employees passengers? (5 Ga. App. 846.)

3. Jernigan places a "For Hire" sign on the front of his touring car, and parks near a hotel. Is he a public carrier of passengers?

4. A college student who had no funds slipped into a Pullman car with the football team and was "parked" away. Is he a passenger? What is he?

5. Smith boards a crowded train in the hope of obtaining a free ride. He was injured enroute. Can he recover?

6. Two traveling salesmen intended to board the Pittsburgh train. They arrived at the station an hour before train time. The train leaving at 10:15 A. M. pulled in at 10 A. M.; they walked through the gate at 10:05 and were seated in the car at 10.10. When did they become passengers?

7. After Rose had bought a ticket he went across the street into a department store where he made a number of purchases. While there he was injured. What are his rights against the railroad company?

8. The conductor permitted a passenger to take his dog into a smoking car. While there the animal became mad and seriously injured a fellow passenger. Is the railroad company liable? (41 Wash. 618.)

9. Is this a good definition? "Baggage constitutes only such articles as are needed during the journey itself." Why should it be otherwise?

10. State which of the following items, in your judgment, are baggage:

(a) Dentists' instruments carried by a traveling dentist.
(b) Two revolvers.
(c) Theatrical property.
(d) Household goods.

11. Is the proprietor of an omnibus line that operates between a railway station and hotels a public carrier of passengers? What is the test? (74 Ill. 116.)

12. A tramp is "beating" his way on a train. What are his rights in case of injury? Is he in any respect a passenger? (83 Ill. 427.)

13. Two ladies are on the same train enroute from New York to Los Angeles. One has ten trunks containing clothing and other personal articles, and the other had one trunk. All the trunks are destroyed and the company claims that "baggage" includes only personal articles which can be conveyed in one trunk. Is the contention of the company well made?

CASE PROBLEMS
(Written or Oral)

No. 187

Plaintiff Hogan went to a railroad station to take a train which was due. The train was late, but he concluded to wait. There were many people in and about the station at all hours of the day and night. While walking about the platform, and without his fault, the plaintiff was knocked down and injured by some men who were fighting. He had not purchased a ticket, but intended to pay fare on the train. Is the company liable? (34 Conn. 554.)

No. 188

Thurston was known as a bad man in general and a gambler in particular. His chief business was to fleece travelers whom he generally met in the smoking car. Having purchased a ticket over defendant's railroad, the conductor prevented him from boarding the train. Thurston brought suit against the company. Result? (4 Dill. 321.)

No. 189

Nevins took passage on the steamboat Metropolis. In the trunk the passenger was carrying were jewelry, lodge regalia, and various engravings. The trunk was lost on the voyage. Nevins brought suit for the value of these articles. What is the liability of the carrier? (4 New York 225.)

No. 190

A person who previously had been habitually drunk and rude in his behavior was refused passage on a train. In his suit for damages the plaintiff proved that he was entirely sober when he made his last application. Was he rightfully rejected? (2 Sumn. 221.)

No. 191

Blake rode in a stage operated by a railroad company which carried passengers to and from its depot. He was on his way to catch a train but had not yet bought a ticket nor declared his intention to do so. May he recover for an injury received through the negligence of the stage driver? (40 N. Y. 168.)

No. 192

A woman bought books for her husband, with money he had sent her for that purpose. These books, together with a volume of her own, were stolen from her trunk in the baggage car. To what extent is the carrier liable?

Chapter XXXIII

AGENCY

Keep in mind these questions when studying this chapter:

1. **In a general way, what is the meaning of agency?**
2. **How does an agent differ from a servant?**
3. **How is the relation of agency formed?**
4. **Who may be an agent, and who may be a principal?**

§ 175. **Introduction.**—The affairs of modern society are conducted on such an extensive, elaborate, and complicated scale that few business transactions can be accomplished entirely through the individual efforts of those concerned. The magnitude and complexity of large enterprises and undertakings, as well as those of lesser consequence; and the necessity of performing many and various duties, often in different places and in remote countries, require that such services be rendered by representatives or agents. These conditions affect all classes from the ordinary business man to the largest corporation. In fact, it is only through agents that corporations can act.

Common examples of agents in everyday life are, clerks in a store, directors of a corporation, railroad ticket agents, lawyers, bank cashiers, brokers, traveling salesmen, purchasing agents, etc.

§ 176. **Definition.**—An agent is one who is authorized to represent and act for another in business dealings with third parties.

Ewell's Evans' Agency recites: An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified.

Agency is a term signifying the legal relation existing between the parties, whereby the agent has authority, express or implied, from the principal, to represent and transact any lawful business for the latter. The agent's power, as a general rule, is fixed and limited by such contract.

In law, whatever a person has the legal right to do personally, may be done by or through another—except those

things which are purely personal in their character. Thus an agent cannot vote for his principal at a public election, take an oath of office, serve a jail sentence, swear to an affidavit, make a will, paint a portrait, and the like.

It is equally true, also, that what one cannot lawfully do himself cannot be done through another. Hence, one cannot appoint an agent to commit a crime, to further litigation, and do other acts of a similar character.

An agent is usually a person, but a firm or corporation may be the agent for another person, firm, or corporation. The agent is sometimes called an attorney, proxy, delegate, or representative. The one represented, usually called the principal, is also sometimes designated as the employer. The person, firm, or corporation, dealt with through the agent, is known as the third party.

§ 177. **Agents and servants.**—A distinction is sometimes made, in law, between principal and agent, and master and servant. Both are forms of employment in which the agent, or servant, acts for some other person. The relation in either case is the result of an express or implied contract.

Under the head of principal and agent, three parties are involved; the principal, the agent, and third parties. The agent is employed in a representative capacity to make contracts for his principal. He may be employed for some particular occasion or to perform some definite act, with more or less authority as to the time and manner of the performance, frequently, but not necessarily, receiving his compensation in the form of commission.

In the case of master and servant, only two parties are usually concerned, the master and the servant. A servant is employed for a definite period of time, at a fixed wage, to perform under the immediate direction and supervision of his employer—the master—some manual or mechanical service, skilled or unskilled, and without authority to bring his master into legal relations with third parties. It must be noted, however, that the relation of agency is a form of employment, and that all agents are servants in a wide and general sense of the word.

Moore owns a newspaper called the Daily Sun. To conduct this business, Moore employs printers, reporters, editors, pressmen, and book-

keepers. These employees are classified as servants. He also employs men to solicit advertising and subscriptions, buy paper, ink, and other supplies. These employees are classified as agents.

§ 178. **Classes of agents.**—Agents may be divided into two classes:

(1) General agents.
(2) Special agents.

(1) *General agents.*—A general agent is one who is authorized to transact all of his principal's business of a particular kind, or all of his business at a certain place. The general manager of a particular business is a general agent. The cashier of a bank is a general agent.

(2) *Special agents.*—A special agent is appointed by his principal to do some specific act or acts, or to transact a definite piece of business. The authority of a special agent is much less than that of a general agent and persons dealing with such agent are required to take notice of their authority.

Adams employs Brink as the general manager of his farm. Acting in this capacity Brink is a general agent. During the course of this employment Adams sends Brink to the city to buy a washing machine for Mrs. Adams. Acting in this capacity Brink is considered a special agent for Brown.

§ 179. **Who may be a principal?**—Any person who is legally competent to act for himself may do, through another, the thing he, himself, might do except as previously noted. It follows, therefore, that one incompetent to make contracts personally is incapacitated from appointing others to represent him legally. The principal must have the same degree of competency that would be necessary if he wished to act in person.

§ 180. **Who may be an agent?**—Since the principal is held responsible for the lawful acts of his agents, much latitude is permitted in the selection of those who may serve as agents. Hence, it follows that, ordinarily, anyone may be an agent who has sufficient intelligence to carry out his principal's orders. An insane person, or a very young child, cannot act as an agent, due to lack of intelligence. But minors, or other incompetent persons may be capable of acting as agents. It must be remembered that an incompetent person's promise to act as an agent is no more enforceable than any other con-

tracts or promises he may make, and that while he may be capable of carrying out the instructions of his principal, he would not be liable to the principal for failure to do so. His contract of agency with the principal is, of course, voidable.

Thompkins, a boy of sixteen, was employed by Carter, who was of legal age and competent to contract, to buy five hundred bushels of corn. While Thompkins was incapable of making a contract for himself, he was competent to act as an agent and to bind Carter for the price of the corn purchased.

Thompkins was employed by Carter to buy five hundred bushels of corn. He was also employed by Bancroft to sell Bancroft's entire crop of corn. Thompkins could not act as the agent of both parties except with their knowledge and consent.

§ 181. **How formed.**—There are four methods by which an agency may be created:

(1) By appointment.
(2) By implication.
(3) By ratification.
(4) By necessity.

(1) *By appointment.*—No particular form of words is necessary for the appointment of an agent; any words that convey the wish of the principal are sufficient. The appointment may be by word of mouth, or by written authority. If in writing, it may be very informal, as a telegram or a letter of instructions, or it may be in a formal writing under seal, or otherwise. If the appointment is for more than one year, then, under the Statute of Frauds the agreement must be in writing in order to be enforceable. Or, if the authority is for the purpose of transferring title to land, or executing an instrument under seal, the authority must be conferred in like manner.

Under an oral agreement made in October, Meyers employed Roberts to manage the former's plantation for the remainder of that year and for the year following, providing neither party canceled the contract January 1. Roberts entered upon the work and continued as manager until May 1, when Meyers discharged him without cause, paying for services rendered to that date. Roberts brought suit for damages for unpaid salary for the remainder of the year. Meyers plead the Statute of Frauds, contending the contract was unenforceable because it was not to be performed within one year's time. It was held that Roberts could not recover for the unexpired term of his contract. The court said: "A contract for personal services to continue for a longer period than one year is plainly within the statute. Thus, if at Christmas I orally hire a servant for one year to begin New Year's Day, I am not legally bound to receive him into my services when he presents himself; and if I do

receive him, I may discharge him afterwards without incurring any other liability than payment of his wages due for the time actually served."

The formal written document appointing an agent is called a power of attorney. It is not necessary to have a power of attorney acknowledged unless it is to be recorded. The following is a form of a power of attorney for the purpose of signing, indorsing, and accepting negotiable instruments:

Power of Attorney

Know All Men by These Presents, That I, Peter Sterling, of the city of Chicago, County of Cook, State of Illinois, have made, constituted, and appointed, and by these presents do

MAKE, CONSTITUTE and APPOINT John Hancock of the City of Chicago, and State of Illinois, my true and lawful attorney, for me and in my name, place and stead:

1. To draw checks against my account in the City National Bank.

2. To indorse notes, checks, drafts, or bills of exchange which may require my indorsement for deposit as cash or for collection in the said bank.

3. To accept all drafts or bills of exchange which may be drawn upon me.

And to do all lawful acts requisite and necessary to be done for effecting these premises, as fully, and to all intents and purposes as I might or could do if personally present at the doing thereof; hereby ratifying and confirming all that the said attorney shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal this tenth day of January, in the year of our Lord one thousand nine hundred and twenty eight

Peter Sterling (Seal)

Signed, sealed and delivered
in the presence of

John Hancock (Seal)

(2) *By implication.*—The appointment of an agent may sometimes be implied from the acts and conduct of the parties. If a supposed principal, knowingly and without dissent, permits another person to act as his agent; or, if by his actions he has led others to assume with reason that such person is his agent, he will be held liable to third parties who have relied upon the apparent authority of the agent. Another form of agency by implication is in the case of partners who are considered the general agents for each other in all the affairs of the partnership.

A son had for years been in the habit of signing his father's name to notes, and with the knowledge of the father, who made no effort to stop it. The father was held liable for the payment of the notes.

(3) *By ratification.*—When a person assumes to act as the agent of another, without real or apparent authority, or when one who is really an agent has exceeded his authority, he does not bind the person for whom he assumes to act, unless the supposed principal subsequently acquiesces in or receives the benefits of such acts. Such approval is known as ratification.

Black is authorized by White to purchase a Ford car for the latter. Black exceeds his authority and buys two Ford cars. White may, if he wishes, confirm the unauthorized act and confirm the purchase of the two cars. If he accepts the extra car he will be bound to the same extent as though he had expressly ordered the purchase of two cars.

Some of the incidents common to ratification are:

(a) The unauthorized act must have been transacted in the principal's name.

(b) The one assuming to act must do so as an agent.

(c) The principal must be ascertainable, and competent to contract.

(d) The entire act (or no part of it) must be ratified by the principal, with knowledge of the facts.

(e) A valid ratification once made cannot be withdrawn.

(f) If the principal refuses to ratify, the agent will be liable to third parties for any damages sustained.

(g) Illegal acts cannot be ratified.

(4) *By necessity.*—In a few instances an agency may be created by necessity. A husband is bound to support his wife

and minor children. If the husband does not provide his wife with necessaries, the law gives her the implied authority to pledge his credit, even against his will. This is also true where the father has wrongfully neglected to provide for his minor children. If the wife or children are amply provided for, then the one selling the goods would do so at his peril. Another illustration is that of a shipmaster, who has the authority to make contracts, pledging the owner's credit, to purchase supplies or to make repairs, while in a foreign port.

QUESTIONS FOR DISCUSSION

(Oral)

1. Brown has hired a maid, and given her authority to sign his name to checks given in payment of grocery, laundry, electric light, gas and water bills. Is she Brown's agent or servant?

2. A publisher engaged a high school student to sell books for him during his spare time. Are the contracts made by the student binding on the publisher? Is the contract between the publisher and the student enforceable?

3. How does the doctrine of agency affect economic activities?

4. Without the father's knowledge, John, who is living with his parents, agreed to sell the family automobile to Smith for $800, all that it was reasonably worth. Must his father sell?

5. Ringling states that an agent can do anything that the principal can lawfully do. Is his statement correct?

6. "This will serve as a notice to all the world that Chester Watson is empowered to act for me in the disposition of all my personal property which I left on my premises at 48 State Street, New Haven, Indiana. John Doe." Does this create an agency. Is the signature sufficient?

7. Jones, Smith, and Jefferson dined at Jones's house. During the course of the meal Smith offered to sell Jones' radio for $100. Jefferson accepted and paid over $25. Jones re-

mained passive, not uttering a word. The next day after due deliberation, Jones refused to go through with the bargain. Is his action justified?

8. Patchin orally agrees to act as agent for Merklin for a period of three years. Later, he refuses to carry out his agreement. Is the contract binding?

9. In a commercial law class it was argued that the word "bookkeeper" imported the relation of agency. What is your opinion? (103 Va. 24.)

10. (a) The principal knowingly appointed an insane person as his agent. Is the principal liable on contracts procured by such an agent?

(b) The agent became insane after his appointment and the principal, with the knowledge of this insanity, permitted the agent to continue to act for him. Is the principal bound? (124 Ga. 332.)

11. A high school student through his agent, Rogers, sold to Jones ten pennants. Is this a valid contract? If Jones is also a high school student what would your answer be?

12. The manager of a drug store placed an order with a salesman for fifty pounds of candy. On the same day, he bought an adjoining lot for the purpose of expanding his employer's business. Are these contracts binding on his principal?

13. Mrs. Williams bought a new electric washer without her husband's knowledge or consent. Can the seller collect? What must he show?

14. Hinman employs Tindall as an agent to attempt to bribe certain public officials. Is the relation of agency lawfully established?

15. Allison, without authority, buys an automobile as agent for Grenfell. The latter repudiates the transaction and refuses to pay for the machine. Who is liable to the seller?

CASE PROBLEMS
(Written or Oral)

No. 193

Principal appointed Henderson, a boy seventeen years old, to act as his agent in selling a team of horses. Henderson entered into a contract with Lumpkin for the purchase of the horses. When the horses were to be delivered the next day, Lumpkin refused to pay for them and set up a defense that Henderson was a minor. Is that a good defense?

No. 194

Kent, an attorney at law, has two clients whose interests conflict. He believes that he can do strict justice to both of them. What is he legally obliged to do? (3 Ga. App. 589.)

No. 195

Traves authorized a real estate agent to purchase a certain house and lot for him for $5,000. The agent bought the property for $4,250 and then sold it to his principal for $5,000. Afterwards Traves was informed of the facts in the case. Did he have any remedy against the agent? (109 Ill. 39.)

No. 196

Mrs. White was deserted by her husband. She purchases groceries from Green, clothing from Brown, and coal from Black. The husband is being sued for the price of these goods. Is he liable? (134 Mass. 418.)

No. 197

Brown, without White's knowledge or request, plows a strip of land around White's wheat field in order to save it from a threatened fire. When White learns of this act he promises to pay Brown for his time and trouble. Is this promise enforceable?

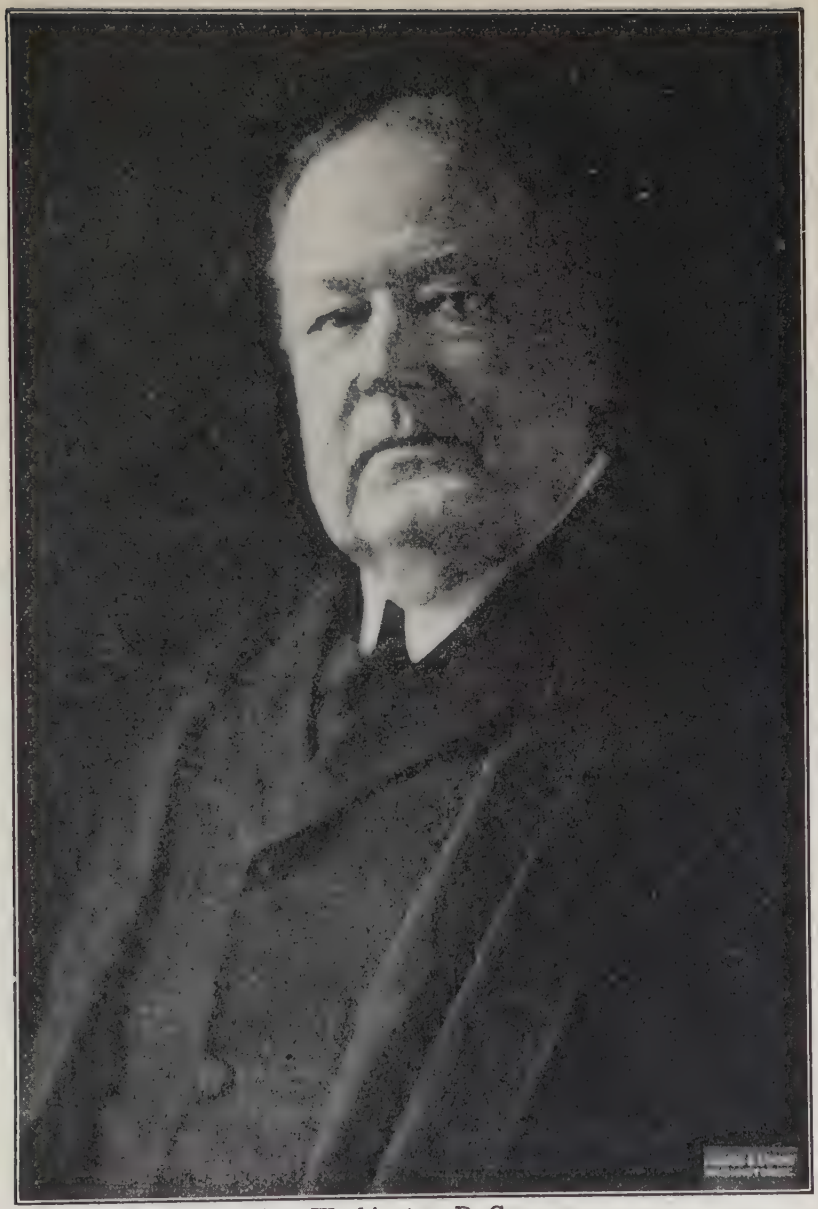


Photo by Harris & Ewing, Washington, D. C.

EDWARD DOUGLASS WHITE

LATE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT

[OVER]

EDWARD DOUGLASS WHITE

LATE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT

Born in Parish of La Fourche, La., November 3, 1845. Died in Washington, D. C., May 19, 1921. Educated at Mt. St. Mary's College, Emmitsburg, Md., Jesuit College, New Orleans, and Georgetown College, Georgetown, D. C. He was admitted to Louisiana bar in 1868 and at once began practice in New Orleans. In 1874 was elected member of the Louisiana Senate, and in 1878 Associate Justice of the Supreme Court of Louisiana. He held this office until 1891, at which time a new Constitution was adopted, which created a new court. He was then elected United States Senator. February 19, 1894, he was appointed Associate Justice of the Supreme Court of the United States. December 12, 1910, was appointed Chief Justice of the Supreme Court of the United States.

Chapter XXXIV

DUTIES AND LIABILITIES OF AGENTS AND PRINCIPALS: TERMINATION

Keep in mind these questions when studying this chapter:

1. **What are the obligations of the agent to the principal?**
2. **In what respect is the agent liable to third parties?**
3. **What are the duties of the principal to the agent?**
4. **What are the obligations of the principal to third parties?**
5. **In what manner may an agency be terminated?**

§ 182. **Duties and liabilities of agents to principal.**—The agent, being the representative of his principal, is under obligations to perform the duties incident to such a relationship. Failure to do so renders the agent personally liable to his principal. The chief duties an agent owes to his principal are:

(1) Loyalty.
(2) Obedience.
(3) Skill, care, and diligence.
(4) Make accounting.
(5) Give information.
(6) Keep property separate.

(1) *Loyalty.*—The first and most important duty every agent owes to his principal is that of loyalty. He cannot represent his principal and another party, secretly, in the same transaction. All efforts of the agent must be for the benefit of the principal. The profits made by the agent in the exercise of his duties belong to the employer. The agent is not permitted to take personal profit from the transactions of his agency.

A clerk, who had access to his employer's books, knew that the latter was negotiating for the renewal of a lease which was about to expire. By reason of this information, the clerk secretly obtained the lease for himself and another person, through misrepresentations made to the landlord. The court compelled the clerk and his fellow conspirator to surrender the lease to the first lessee. (59 Cal. 119.)

An employee was offered a bonus, in excess of the regular price of

the goods sold, if he would see that they were delivered in advance of the regular delivery. The money thus paid was required by the court to be turned over to the employer. (15 Ill. 507.)

(2) *Obedience.*—The next duty of the agent is to obey the instructions of his principal, if they are reasonable and lawful. If he disregards his instructions and losses ensue, the agent will be personally liable for the damage. An agent is not bound to obey instructions to do an illegal or immoral act, such as smuggling goods, selling libelous books or contraband articles.

If an agent is instructed to ship goods at a certain time over a designated route, and he ships at some other time over a different route, and a loss results, the agent will be held liable. So, also, if he is told to insure the goods and fails to do so, the risk is the agent's risk. (88 Am. Dec. 416.)

(3) *Skill, care, and diligence.*—An agent is under obligations to exercise that degree of skill, care, and diligence in the affairs of his principal that a reasonably prudent man would use in the business in which he is particularly engaged. A failure to do so makes the agent liable for any damages sustained.

An agent who lends money for his principal must exercise care in getting sufficient security, and use diligence in collecting the debt when due. If the agent is employed as a salesman he must use diligence in making sales and securing the business for which he is employed.

Physicians, and others who hold themselves out to the public as possessing skill and special attainments in their professional capacity, will be held responsible for the skillful acts ordinarily performed by persons in that calling.

(4) *Make accounting.*—It is the duty of agents to keep accounts of all pecuniary transactions relating to the agency, so that they can account to their principals for all money and property that may come into their possession. The money should be deposited in a reasonably safe bank in the name of the principal. If deposited in the name of the agent and the bank fails, the loss will fall on the agent. When the agent has collected money belonging to the principal, he should promptly notify him; and if intrusted with goods for sale, he should account for the proceeds within a reasonable time.

(5) *Give information.*—It is the further duty of the agent to keep his principal informed. He must give timely notice of such information as may be advantageous either in promoting the prosperity of the agency or in protecting his principal's interest from loss.

(6) *Keep property separate.*—It is the duty of the agent to keep his property and that of his principal separate, so that they may be distinguished. If the agent does so mix the property of both of them that they cannot be separated, then the entire property will belong to the principal.

§ 183. **Liabilities of agents to third parties.**—Whenever an agent acts within the scope of his authority, he binds his principal upon the contract formed and no liability attaches to the agent. However, an agent may, in several ways, become personally liable. Thus:

(1) When one assumes to act as agent for another without authority, or if authorized to act, and he exceeds, or materially departs from his authority, he will become personally liable to the person with whom he is dealing.

(2) If the agent conceals the fact of his agency and treats with the third party as though he were the principal, he becomes liable to the same extent as though he were actually the principal.

(3) An agent may make himself personally liable to third parties by an express agreement to become responsible.

(4) An agent binds himself, and not his alleged principal, if he fraudulently or falsely represents himself as an agent.

(5) The agent is liable for any tort, or wrongdoing, committed by him while serving his principal, whether done through his own disobedience, carelessness, or malice, or by order of his principal.

§ 184. **Duties of principal to agent.**—The principal is liable to an agent in the exercise of his agency for the following obligations:

(1) Compensation.
(2) Reimbursement.
(3) Indemnification.
(4) Agent's lien.

(1) *Compensation.*—The agent is entitled to compensation for his services, either in salary or commission, as may be agreed upon; or in the absence of an agreement, then according to the usage of trade at the place where the business was transacted, unless it were agreed that the agency was a gratuitous one.

An agent is not entitled to compensation for consciously doing an illegal or immoral act, although he may have been so directed by his principal.

If the agent is employed for a definite period and is wrongfully discharged before the termination of the agency, he will be entitled to compensation for the damages thus sustained, as in the case of any other breach of contract. But it is the duty of the agent wrongfully discharged to make a reasonable effort to secure other similar employment so as to reduce the amount of damages caused by reason of the discharge. It is also true that, if the agent abandons the agency before the agreed time, he will likewise be liable to the principal for any damage caused by his breach of the contract.

(2) *Reimbursement.*—It is the duty of the principal to reimburse the agent for all legitimate expenses and disbursements, necessarily incurred by him in the lawful discharge of the agency, for the benefit of the principal.

The agent's outlay must not be for an illegal purpose, nor can he recover for unnecessary expenses incurred by his own fault or negligence. An agent appointed to make a transfer of title of property caused it to be made to the wrong person. It was held he could not recover money paid as expenses to secure a correction of the mistake consequent upon his blunders. (48 N. J. Eq. 411.)

(3) *Indemnification.*—Every agent is entitled to be indemnified by his principal for any losses or damages he may sustain in doing any authorized, lawful act, done in the execution of his authority. The loss or damage must proceed directly from the execution of the authority. An agent, robbed of his own money while on a journey for his principal, would have no lawful claim for indemnity.

An agent, acting under directions from his principal, entered upon the lands of another by mistake and cut timber, the principal receiving the proceeds. The principal had to indemnify the agent for the damages he was obliged to pay for the trespass. (39 Me. 347.)

But the principal need not indemnify the agent for destroying the

property of another without lawful excuse, even though he was directed to do so by the principal. The law does not encourage lawbreakers.

(4) *Agent's lien.*—A lien is the right of retaining the property of another until the claim of the person in possession is satisfied. This right does not vest the title in the holder, but is merely a right of detention. An agent is entitled to a lien for the protection of his right to reimbursement, and indemnification.

§ 185. **Obligations of principal to third parties.**—The principal is as liable to third parties for the authorized acts and contracts done or made by the agent as if the business had been personally transacted by himself. He is also liable for any unauthorized acts or contracts, if subsequently ratified, or if within the scope of his employment. The principal is not bound by a performance made outside of delegated authority and not within the scope of employment. It is, therefore, the duty of third parties, dealing with agents, to ascertain their authority; otherwise they will deal with them at their peril.

§ 186. **Wrongful acts.**—The principal is liable to third parties for the wrongful acts (torts) of the agent, if authorized or subsequently ratified. He is likewise liable for the agent's negligence or carelessness within the scope of his employment, and sometimes for his wilful and malicious acts.

If a taxicab driver, in the course of his employment, carelessly or negligently injures a passenger, or pedestrian, his employer—the principal—is liable to the injured party. This is true although done without the knowledge or consent of his employer. The taxicab driver may also be held liable.

A farmer was about to drive across the track of a railroad when the engineer in a near-by engine let out steam from the engine with such a loud noise that it caused the farmer's team to run away and injure the farmer. The railroad company was held liable. The court ruled that it did not make any difference whether the act of the agent was necessary, or whether he did it wilfully and wantonly. (47 Ill. 298.)

§ 187. **Statements and representations.**—Statements or representations by the agent, made in the course of the agency and within the scope of his authority, are as binding on the principal as though made by him. This is true regardless of whether the statements or representations be true, or false and fraudulent.

Notice to the agent, with reference to matters over which

the authority of the agent extends, is deemed notice to the principal.

§ 188. **Termination of agency.**—The general ways in which the authority of an agent may be terminated are:

(1) By acts of the parties.

(2) By operation of law.

(1) *Acts of the parties.*—The general ways in which the relation of principal and agent may be terminated by acts of the parties are: (a) agreement; (b) breach; and (c) performance.

(a) *Agreement.*—The relation of principal and agent being founded upon mutual assent, it may be dissolved at any time by the agreement of the parties. When it is expressly agreed that the agency is to exist for a specified time, it automatically terminates at the end of that time. It may, however, be renewed or continued if the parties so elect.

(b) *Breach.*—It is a general rule that the agent's authority may be revoked at the pleasure of the principal. Where the authority or the agency is "coupled with an interest," this right does not exist. If the principal revokes the authority contrary to his previous express or implied contract, he may subject himself to a claim for damages suffered by the agent.

"*Coupled with an interest*" has reference to any interest the agent may have in the subject-matter of the agency other than merely the compensation to be received in the form of commission or otherwise, in the performance of his duties. Thus, where the agent is given authority to collect a debt and to reimburse himself for money advanced the principal, the agent's rights are said to be couped with an interest.

If either party refuses to carry out his part of the contract, such default will end the agency, and the injured party may recover damages sustained by such failure. If the agency is a gratuitous one, then its termination at the will of either party would end the relation without liability for damages.

The employment may ordinarily be terminated at will by either party upon notifying the other, if the duration of the employment was for no previously fixed time. In such a case, the agent may recover pay for services rendered.

The principal may discharge the agent at any time without incurring liability, if the agent becomes incompetent, disobedient, disloyal, or is guilty of misconduct.

(c) *Performance.*—If the agent is employed to do some specified act or series of acts these being performed, the agency would be terminated. Likewise, the agency will be terminated if the purpose for which it was formed has been accomplished before the agent had an opportunity to act. Since there is nothing further for him to do, his authority is ended. If an agent is employed to purchase a farm, the purchase of the farm will end the agent's authority. Or, if an agent is employed to sell a house and lot and the building is destroyed by fire before a sale has been made, the destruction of the building will terminate the agency.

(2) *Operation of law.*—The general ways in which the relation of principal and agent may be terminated by operation of law are: (a) death; (b) insanity; (c) bankruptcy; and (d) war.

(a) *Death.*—The authority of the agent terminates at once by the death of the principal—unless the power is coupled with an interest. The agent's authority ceases immediately, although his term of employment may not have expired, nor can he have redress for the termination of his authority. Contracts made by the agent with third parties, in ignorance of the principal's death, are not enforceable.

(b) *Insanity.*—Unless the authority be coupled with an interest, the insanity of either the principal or agent terminates or suspends the agent's authority. If the principal has not been judicially declared insane, third parties dealing with the agent in good faith will be protected.

(c) *Bankruptcy.*—The bankruptcy of the principal revokes the agent's authority—unless coupled with an interest. In the event of the bankruptcy of the principal, his property passes from his control, and with it the subject-matter of the agency. Upon the bankruptcy of the agent, his authority is revoked except where it is for the doing of some merely formal act, as the execution of a deed.

(d) *War.*—The breaking out of war between the country of the principal and that of the agent, if they are of different countries, dissolves—or at least suspends—the relation during hostilities.

QUESTIONS FOR DISCUSSION
(Oral)

1. William James had two accounts at the bank. One was in the name of "William James" ($400) : the other "William James, Agent" ($600). The bank failed. How much money does James lose?

2. An insurance agent had authority to take thirty-day notes in payment of premiums where cash could not be collected. The agent in question extended this courtesy to Never Sweat Bill whose classification by the Credit Rating Bureau was "very poor." Is the agent liable for the note if Bill does not make good his promise?

3. White, an agent, representing the "Clearwater Bottling Works," agreed to deliver to a drug store one hundred cases of their best brand of distilled water. There being no bottling works of that name in existence, delivery was never made. What are the buyer's rights?

4. A book agent's outfit consisted of one leather case and a set of books valued at $25, which, according to the agency agreement, were to be returned to his employer upon the termination of the agency. The term has expired and the principal makes demand for the case and books. The agent refuses, claiming that $5 in commission is due him which he has not received. Result?

5. The principal instructed his agent to resort to physical violence, if necessary, to exact an apology from a competitor. The occasion, it seems, demanded physical violence. Is the agent or principal liable for damages?

6. Brown, living in New York, entered into an agency agreement on December 10, 1918, for one year with Schultz, residing in Berlin. What are Schultz's rights if Brown discharges him? Give reason for your answer. (9 Wall. 72.)

7. Lipton employed Gardner to sell a cargo of tea being shipped from India. The entire cargo was lost at sea through no fault of Lipton. What effect does this have on the agency?

8. Claflin, while acting as salesman for the Auto Motor

Company, ran into and damaged another car. As a consequence, Claflin had to pay for the damages which happened to the other car. Is Claflin entitled to be reimbursed? If the accident had been the result of a violation of law what would your answer be?

9. Doe was employed as the driver of a grocery delivery truck. After working hours, and without his employer's knowledge, he used the truck for his personal use in making a trip to a neighboring town. While on the road he wilfully drove into and damaged a car belonging to another driver with whom he had previously had a controversy. The injured party brings suit against the owner of the grocery truck. Result?

10. J. B. Duncan is the president of the Sunshine Shoe Polish Company, a corporation. In what form should Duncan sign legal documents for the corporation so as to escape personal liability?

CASE PROBLEMS
(Written or Oral)

No. 198

Graves appointed Welch, his agent, to rent his house, but instructed the agent to make no repairs. The house was badly in need of repairs. Welch secured a tenant and agreed to have the house repaired. Who is liable for the cost? (125 S. W. 931.)

No. 199

Welch deposited the money he collected for his principal in a bank along with his own funds. The bank failed. Who must bear the loss? Explain how the money should have been deposited. (98 Ind. 134.)

No. 200

The guardian of a minor purchased an undeveloped mine, with money belonging to his ward. The guardian took title in his own name, but intended to account to the ward for the

money thus used. On arriving at his majority, the young man refused to accept the money and interest, but claimed the mine as his property. Explain to whom the mine belongs. If the mine had been a failure, what would your answer be? (71 Pa. St. 106.)

No. 201

Musser employed Doe to do some carpenter work, and, while thus engaged, Doe, seeing Rankin approach, hurled his hammer at him and severely injured him. Is Musser liable? (46 Ill. 494.)

No. 202

A fireman in a printing plant was authorized to purchase coal. The fireman let the contract to the Acme Coal Co., the lowest bidder. The coal company had previously and secretly agreed to give the fireman a commission for all coal bought. What right, if any, does the fireman have to this commission? (12 Md. 383.)

No. 203

An agent who had been employed for one year began to use intoxicants and narcotics. These habits did not reduce the efficiency of the agent except that it affected his reputation and that of his principal. As a consequence his sales were on the decline. Would this justify a discharge of the agent? (21 Ohio Cir. Ct. 199.)

No. 204

An agent was entitled to a salary of $150 a month, and participation in the profits to the extent of 5% of the whole. He had worked nine full months when he died. The salary for the last month was unpaid, as was his share of the profits which totaled $3,000. The principal refuses to pay. He claims the contract is terminated by the death of the agent, and that this excuses him from all liability under it. What is your opinion? (26 N. Y. 279.)

Chapter XXXV

MASTER AND SERVANT

Keep in mind these questions when studying this chapter:

1. **How does the relationship between master and servant arise?**
2. **What are the duties and liabilities of the master?**
3. **When may a servant be discharged?**
4. **What is the character, and effect, of Employer's Liability Acts?**
5. **How do the Workmen's Compensation laws affect servants?**

§ 189. **Master and servant.**—The relationship existing between the employer and employee, or the more technical terms, master and servant, is created by contract, express or implied, and exists when one person or firm hires the labor of another for a definite time.

The one who employs the labor of another is called the master, and the one so employed is the servant. The word servant embraces all persons who are in the employ and subject to the control and direction of another. In early times, the word servant was used to describe those engaged in domestic service. It has been since extended to include all employees who perform operative or mechanical labor. It has a much broader meaning than that of a mere domestic servant.

A vice-principal is one who is in the employ of the master, but with authority of superintendence, control, or command of other persons employed in the same service.

A fellow-servant is one engaged with others in the same service, in the same grade of employment and for the same master.

Carpenters engaged in building a house, laborers on a railroad section, operators in a mill, would be fellow-servants. But if they were employed in different departments they would not be so classified. A Pullman conductor and porter would not be fellow-servants with the rest of the train crew.

§ 190. **Duties of the master.**—The liability of the master for injuries done servants and third parties is a fruitful source

of litigation. At the outset, let us understand that, under the early common law doctrine, the master is not an insurer of the life and limb of the servant; that he is not bound to indemnify the servant against injuries happening in the course of his employment; and that the employee assumes the ordinary risks incident to his occupation. A person is not bound to enter a particular service, but if he does accept such employment, he must take things as he finds them. Nevertheless, it is the duty of the master to exercise reasonable care in protecting his servants or employees from needless danger, and a failure to do so will cause him to be liable for any resulting damages. Some of the important duties the master owes to the servant are considered below.

(1) The master must provide a reasonably suitable and safe place for his workmen while at work. If the place is unsafe because of the nature of the occupation and not through the want of proper precautions having been taken to make it safe, then the employer is not liable.

A powder mill is obviously not as safe a place in which to work as is a flour mill. But if dangerous explosives were stored in the flour mill, unknown to the employee, and he should be injured by an explosion, the master would be liable.

(2) It is the duty of the master to furnish the proper tools, machinery, and appliances of the business for his workmen. They need not be the best tools and machinery obtainable, nor of the latest improved pattern, but they must be reasonably safe and be adapted to the purpose for which intended.

Many of the states have enacted laws requiring that safety devices and appliances be placed on machines wherever possible, in order to afford protection to those who must use them. Railroads were required, some years ago, to equip their cars with car couplers, which reduced the danger of injury to brakemen to a minimum.

(3) It is also the duty of the master to employ persons who are competent or fit for the work which they are employed to do. He has no right to jeopardize the lives of others by placing incompetent or inexperienced persons in charge of dangerous machinery.

(4) The master must also give special instructions to servants in exceptional situations. Young or inexperienced per-

sons must be informed regarding the use of dangerous machines, and be warned of the hazard in the carelessness of their use.

Plaintiff, a carpenter, was employed by defendant to go upon a submerged lot in a boat to do certain work. The possession of the lot was in dispute, and with a threatened resort to arms. This was known to the defendant, but unknown to the plaintiff who, in ignorance of the danger to which he was exposed, entered upon the property, was fired at from an adjacent lot and injured. The withholding of the information from the plaintiff of the risk he incurred caused the defendant to fail in his duty. He was bound to communicate the information to his servant, who was entitled to such information on the subject as the master may possess. The employer was, therefore, liable in consequence of the injury done. (44 Cal. 187.)

§ 191. **Master's liability.**—The master is liable for the acts of servants in the course of the master's business. This rule has also been held to apply where the employee wilfully and maliciously causes injury to another. This is especially true where a passenger has been injured by an employee of a public carrier. Carriers of passengers are held to a high degree of responsibility for the acts of their servants.

The servant is liable, as well as the employer, for any injury done wrongfully or negligently. If the act is of such a character as to impose a criminal liability, that penalty may be assessed in addition to pecuniary damages.

Smith was employed by Brown as a servant. Brown sent Smith on an errand to a neighboring village. After the errand was finished, Smith drove to another town on personal business of his own, and while doing so negligently drove the car so as to cause injury to King. Brown was not held liable for the injury. Why? (71 Me. 432.)

B was employed by defendant as a farmhand. A cow broke into defendant's field, and in driving the cow out of the field, B killed her with a stone. Defendant was held responsible. (153 Md. 245).

A passenger on a street car censured a conductor for abusing a boy for trying to steal a ride on the car. The conductor then maliciously assaulted the passenger. The company was held liable for the misconduct of the conductor. (43 Am. Rep. 185.)

§ 192. **Fellow-servant rule.**—As before stated, the servant assumes the risk incident to the nature of his occupation. This applies in a great measure to injuries resulting from the careless or wrongful acts of co-servants. The employer at common law cannot be held liable for an injury received by one servant on account of the negligence of his fellow-servant,

there being no fault on the part of the employer, but he would be liable if the injury were caused by a vice-principal. If the master works by the side of the servant, that fact would not exempt the master for any injury he might cause as a fellow-servant, he is as answerable as he would be to a stranger.

The modern tendency of statutes and court decisions has been to modify and change the laws in respect to responsibility for injuries resulting from the acts of fellow-servants. In some states, the rule is entirely disregarded, and the master is held liable unless there is contributory negligence on the part of the injured employee. And in some instances, the employee is allowed relief in proportion to his negligence. In other states, he is allowed full compensation unless the injury was caused by wilfullness or gross carelessness on his own part.

§ 193. **Contributory negligence.**—The master is not liable to the servant for an injury due to the latter's own contributory negligence. The indirect cause of the injury might be due to the negligence of the master, or someone acting for him; but if the injured servant contributed directly to the cause by his own fault or negligence, then he cannot recover for any damages that may result. Everyone is bound to use reasonable care to protect himself from injury.

§ 194. **Justifiable discharge.**—The servant may be discharged for any one of the following causes:

(1) Wilful disobedience.
(2) Moral misconduct.
(3) Incompetency or disability.
(4) Neglect.

(1) *Wilful disobedience of any reasonable and lawful order.*—If the servant refuses to obey the reasonable orders of the master, even though they may seem severe and hard, it is good grounds for dismissal from service for insubordination. In every contract of hiring it is implied on the part of the servant that he will obey the lawful and reasonable commands of his employer. If the order were for the doing of some unlawful act; or it is not within the scope of his employment; or would expose him to dangers not incident to the

business, the employee may refuse to obey without making himself liable to dismissal upon legal grounds.

Plaintiff was employed as a teller in a bank, where he was in the habit of remaining after banking hours. The bank had iron shutters, used to guard the windows, and which the teller left open nights. Upon being remonstrated with by the cashier, the teller replied he would leave them open whenever he wished. The cashier closed the shutters at the close of the banking day, but found on the next day that the teller had again left them open, and upon again being remonstrated with, said he would open them just when he pleased. This was held to constitute a sufficient cause for dismissing the teller from service, although he had a contract of employment for a term. (1 T. & C. (N. Y.) 361.)

(2) *Gross moral misconduct.*—If a servant defrauds his master, or aids in doing so; if he reveals his master's trade secrets; or spread defamatory reports disclosing family secrets in disregard of the obligation to protect his master's interests, he will afford good and sufficient cause for a discharge therefor. Serious illness on the part of the servant absolves the master from the contract. Both of them are released from their mutual obligations.

(3) *Incompetency, or permanent disability.*—If a person contracts to labor for another, there is an implied contract that he possesses the requisite skill, experience, and knowledge to discharge his duties, and the employer would not be compelled to retain him for the time hired or pay damages for discharging him, if he were unable to perform the particular services for which he was employed.

(4) *Habitual neglect in performance of duties.*—Generally, a single act of negligence will not be sufficient ground upon which to discharge a servant. The negligence must be habitual rather than occasional.

§ 195. **The Federal Employers' Liability Act.**—The rule of law excusing an employer from liability to an employee for an injury caused through the carelessness of another employee is the result of court decisions, sometimes known as "judge-made law." There was no written or statutory law governing such situations. In the course of time, the courts began to favor the employees in their decisions, and to modify the early rules in this regard. Some of the states passed statutes particularly applicable to railroad employees, who were allowed

to recover damages even though the injury was caused by a fellow-servant.

In harmony with the trend of the times, Congress, in 1908, passed, and later amended, what is known as The Federal Employers' Liability Act which provides rules governing the liability of railroads engaged in interstate commerce, to employees and their representatives, for injuries or death, while in the pursuit of their calling. Its important provisions are:

(1) Common carriers (as railroads) engaged in interstate or foreign commerce or operating in territories or other possessions of the United States are liable for injuries to employees resulting in whole or in part from the negligence of any officer or employee or by reason of any defect or insufficiency, due to its negligence, in its rolling stock, track, machinery, roadbed, or other equipment.

(2) Contributory negligence of the employee does not bar recovery, but damages are diminished in proportion to the degree of negligence of the employee. But no contributory negligence of the employee will affect his right to recover where the employer's violation of a statute enacted for employee's safety contributed to the injury.

(3) Contracts or other devices intended to exempt the employer from liability created by this act shall be void.

(4) Upon the death of the injured party, the action shall survive for the benefit of the surviving spouse, children, heirs, next of kin.

§ 196. **Arbitration Act.**—Another important law passed by Congress in 1925 under the title of The United States Arbitration Act has for its chief purpose making "valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, etc." This is an effort to give legal sanction to the settlement of disputes by arbitration in connection with contracts. This does not mean that contracts must contain agreements to arbitrate, (their inclusion is entirely voluntary) but if such provisions are included, they are as binding as any other feature of the contract.

§ 197. **Workmen's Compensation Laws.**—The common-law principles governing the relations of employer and employee

have been very largely abandoned, in practically all of the states, by the enactment of statutes under the title of Workmen's Compensation Laws or Workmen's Industrial Insurance. These laws provide for compensation to injured workmen in the case of industrial accidents, and are designed to include all accidents which may be properly classified as occupational injuries. In some states, the Acts apply to industrial diseases as well as to accidents. The employments covered include transportation, construction, and manufacturing, and exclude agriculture, domestic service, and occupations not conducted for pecuniary gain. The essential features of these laws are:

(1) The indemnity for injuries is payable without regard to fault, unless the accident is due to the wilful negligence of the employee; and in some instances while the employee is intoxicated.

(2) The amount of the indemnity is based directly upon the workman's earning capacity according to a given schedule. The test of the right of indemnity is, did the accident arise "out of and in the course of employment."

The plan in brief may well be described as simply accident and life insurance for workmen while on duty, the employer being required to pay compensation to his injured workmen and their dependents. In those states where a Workmen's Compensation law is not in force, an injured workman's remedy is an action at law in which he must show that the injury was caused by the negligence of the employer. When such an action is brought against the employer, he has the following defenses:

(a) That the accident was not caused by the employer's negligence.

(b) Contributory negligence, that is, the negligence of the employee, directly contributed to the cause of the accident.

(c) Assumption of risk, that is, that the employee voluntarily assumed the risk, the hazard being presumably taken into account in fixing the wages.

(d) Fellow-servant doctrine, that is, that the accident was due to the negligence of a fellow employee, which, at common law, is one of the assumed risks.

QUESTIONS FOR DISCUSSION
(Oral)

1. Wall is the owner of a machine shop. The personnel of his establishment is composed of the following employees:

(a) One general manager.
(b) One bookkeeper.
(c) One stenographer.
(d) Two foremen.
(e) One truck driver.
(f) Twenty machinists, and helpers.

Classify each person according to his relationship with the owner.

2. The owner of a factory refuses to give any consideration to an employee's complaint regarding an injury sustained by the latter because "the contract says nothing about it." What is your opinion? (162 Fed. 587.)

3. An employee, working about a building, was killed by a mass of ice which had accumulated on the roof of the employer's factory and had fallen on him. To what extent is the master liable?

4. An employee was killed by the falling of the wall of a burned building on an adjoining property. Can his representative recover from the employer? (246 Fed. 943.)

5. Doe was hired to cut soles in a shoe factory. He used one of the tools, in place of a fingernail file, in manicuring, and cut his hand severely. Can he recover from the master?

6. A servant who was hired to make deliveries for his master was given a pair of bronchos to use for this purpose. When the animals became unruly the servant was seriously injured. Is the master liable? (208 Fed. 274.)

7. Barton was injured when a fellow-servant negligently operated the machine at which both were employed. It was shown that the fellow-servant was an habitual user of drugs and narcotics at the time he applied for work. Under the common law is there any liability here?

8. An upholsterer was called into the office of the president of the company to repair several of the office chairs. While he was thus engaged one of the clerks, who mistook the upholsterer for a fellow bookkeeper, in a spirit of so-called sport caused him much physical discomfort. Is the employer or the employee liable? (60 Ohio St. 448.)

9. In a personal injury case, it was contended the cause of the employee's injury was his own negligence. Discuss his right to recover damages (a) at common law; (b) under Workmen's Compensation laws.

10. Under what circumstances is an employee subject to discharge before the expiration of the term of his employment? Why are such regulations reasonable?

CASE PROBLEMS
(Written or Oral)

No. 205

Adams employed Black to work for three weeks in the former's garden. Was Black an agent or a servant? What would your answer be if Adams had employed Black to deliver a parcel?

No. 206

A brakeman, employed on a freight train, has used a defective grab-iron on the caboose of the train on which he has been working at least five times daily for three weeks. During all this time he knew the grab-iron was defective, but failed to notify the proper authorities of its defect. To what extent would the company be liable, if he received an injury on account of this defect? (145 Calif. 255.)

No. 207

While a train is standing at the depot waiting time for departure, the engineer blows the whistle as a joke in an effort to scare a near-by horse which Jones is riding. The horse runs away and Jones is injured. Is the railway company liable to Jones for damages? Is the engineer also liable? (17 W. N. C. 227.)

No. 208

Adams and Black were employed by the Western Railway Co., the former as an engineer, and the latter as fireman. Through the negligence of Adams, a collision occurred in which Black was injured. Can Black maintain an action against the railway company for damages? (4 Metcalf 49.)

No. 209

Adamson was employed for a week as a stationary engineer in a large manufacturing plant. Nothing was mentioned in his contract in regard to the use of alcoholic liquors. After he had been employed, the company made a rule that all employees must abstain from the use of such liquors. Adamson was threatened with discharge unless he quit drinking. Being a moderate drinker, he refused to quit and was discharged. He thereupon sued on his contract. Result? (82 Ala. 452.)

No. 210

A servant of mature age left his machine to seek his employer for the purpose of having a dangerous defect removed. Not finding the owner he returned to his work and was injured because of the defective machine. Can he recover? (181 Mass. 397; 63 N. E. 911.)

No. 211

A traveling salesman used an automobile to cover his territory. Returning from a trip after dark, he saw a wagon that had been run into by a car. He stopped to see if he could be of assistance, and in walking back to where the accident happened he was run into by a passing automobile and was killed. Is there a liability under the compensation laws? (186 N. W. R. 486.)

No. 212

An employee was injured while running a handcar at night, with his foreman and other laborers, for the purpose of taking two camp cooks to town on a social visit. What are the rights of the employee against his master? (163 S. W. 619.)

No. 213

A circus employer allowed a minor employee to sleep on a flat car. The boy was injured. Is the proprietor of the circus liable? (111 Kansas 562.)

Chapter XXXVI

PARTNERSHIP: FORMATION

Keep in mind these questions when studying this chapter:

1. **What are the advantages of a partnership combination?**
2. **How is a partnership formed?**
3. **What is a partnership?**
4. **For what purposes may a partnership be formed?**
5. **What are the usual requirements in the articles of copartnership?**

§ 198. **Purpose of forming a partnership.**—The chief object in forming a partnership is the mutual benefit and advantage to the members of the firm. They may be formed to cover the whole field of useful and gainful occupations carried on by men. Oftentimes it is more profitable, economical, and practical for several persons to unite capital, labor, or experience for their common good than to conduct enterprises in their several individual capacities.

In a partnership combination, it is possible that the beneficial advantages may be secured through some one or all of the following conditions:

(1) Lessening or eliminating competition.

(2) Enlarging the capacity of the business by concentrating or increasing the capital.

(3) Combining widely differing knowledge, experience, and ability with wealth.

(4) Reducing expenses.

(5) Co-operation and division of labor.

While the foregoing are some of the many advantages resulting from partnership combinations, it must also be remembered that there are disadvantages, as will be apparent from a study of the law governing the subject. Indeed, such a relationship should never be undertaken, except with persons of known honesty, integrity, and fidelity.

The subject of partnership will be considered under the following main divisions:

1. Formation of and incidents common to partnerships.
2. Operation and principles underlying their existence.
3. Dissolution and its effect.

§ 199. **Definition.**—A partnership is an association—not incorporated—of competent persons who have united their money, property, or skill, as principals, for the purpose of carrying on some lawful business or enterprise, for their joint profit.

Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profit between them. (New York Code of Civil Procedure.)

A partnership is an association of two or more persons to carry on as co-owners a business for profit. (Uniform Partnership Act.)

The association must be for the purpose of carrying on some lawful business for profit. An arrangement for a pleasure trip, a ladies' club, a labor union, or the maintenance of a fire company for the public benefit, is not considered a partnership—although there is a liability on the part of the members for debts contracted in their behalf.

The persons forming a partnership are referred to collectively as a firm, a house, or a company. Individually, they are known as partners, or copartners.

In a partnership, the act of one partner is the act of each of the other partners; each partner is an agent of the firm for the purpose of the business of the partnership; and each partner is jointly and individually liable for all the debts of the firm.

§ 200. **Who may be a partner?**—While any number of persons may become partners, only those capable of making a valid contract on their own account may enter into a partnership relation.

§ 201. **Partnerships classified.**—Partnerships may be classified as:

(1) Ordinary common law.
(2) Limited.
(3) Joint-stock company.

(1) *An ordinary or common law partnership* is one in which the partners have united their money, property, or service for carrying on some general line of trade or business, or some one branch of trade or business. A partnership may be formed for the purpose of conducting a single transaction or adventure as well as a series of transactions.

(2) *A limited partnership* is one in which the liability of some of the partners is limited for partnership obligations to the amount of their investment. They are formed in accordance with statute law of the different states. (See § 220.)

(3) *A join-stock company* is formed under authority of the common law. The investments of the members are represented by transferable shares. There are other distinctions that will be considered under this topic later. (See § 221.)

§ 202. **The various kinds of partners.**—Partners may ordinarily be classified as follows:

(1) Ostensible.
(2) Nominal.
(3) Secret.
(4) Silent.
(5) Dormant.

(1) *Ostensible partners* are those who are held out to the world and are openly avowed as partners. There is no concealment about their connections with the firm—they are real partners.

(2) *Nominal partners,* on the other hand, are those who represent themselves or permit others to represent them to the public as partners, but who really are not so. They do not share in the profits of the partnership, but under certain circumstances may be held liable for the firm debts.

(3) *Secret partners* are those whose relation with the partnership is concealed from the public. They may, however, have an active part in the management and control of the business.

(4) *Silent partners* have no active part or voice in the management of the business of the firm, but they do participate in the profits as partners. Their connection with the firm is not necessarily concealed from the world.

(5) *Dormant or sleeping partners* (as they are sometimes called) are partners who are unknown as such to those who have dealings with the firm; they have no part or share in the control or management of the firm business but they do share in the profits.

§ 203. **How formed.**—As between the parties themselves a partnership is founded upon a voluntary contract, and as such must have all the essential elements requisite to the forming of any other contract. When a contract of partnership is once formed, no other person can afterwards be admitted into the firm as a partner without the consent of each of the partners composing the original firm.

In the absence of statutes, no particular or peculiar form is necessary to create a partnership agreement. The contract may be express or implied; it may be written or oral. If written, the document need not conform to any specific wording. The written instrument is familiarly known as "Articles of Copartnership."

While it is not necessary under the common law that the agreement be in writing, regard must be had for that section of the "Statute of Frauds" which provides that any contract not to be performed within one year must be in writing and signed by the parties to be charged. This requirement applies to agreements for the relationship to begin more than one year from the date of the agreement, or to last longer than one year from the time of forming.

When the partnership is to continue for any length of time, or where there are many interests involved, it is desirable that the agreement be written, care being taken to see that the intentions of the partners are definitely expressed in order that there may be no future misunderstandings. When a contract is once reduced to writing, it is presumed to contain the complete agreement of all the parties.

The following is a practical illustration of a written agreement of copartnership:

Articles of Copartnership

This contract made and entered into on this the 2d day of April, A. D. 1928, by and between C. W. Keeland of Springfield, Illinois, of the first part and A. D. Munson of the same city and state of the second part.

WITNESSETH: That the said parties have this day formed a copartnership for the purpose of engaging in and conducting a retail hay, grain, feed and coal business under the following stipulations which are made a part of this contract:

1. The said copartnership is to continue for a term of three years from date hereof.
2. The business shall be conducted under the firm name of C. W. Keeland & Co.
3. The investments are as follows: C. W. Keeland, $2,500; A. D. Munson, $2,500.
4. All profits or losses arising from said business are to be shared as follows: C. W. Keeland, one-half; A. D. Munson, one-half.
5. Full set of books to be kept and financial statement rendered annually.
6. Each partner is to devote his entire time and attention to the business and is not to engage in any other enterprise without the written consent of the other.
7. Each partner is to have a salary of $200.00 per month, the same to be withdrawn at such time or times as he may elect. Neither partner is to withdraw from the business an amount in excess of his salary without the written consent of the other.
8. C. W. Keeland is to have general supervision of the business, place all orders for merchandise, have charge of the books, and sign all business papers or authorize the bookkeeper to sign them. A. D. Munson is to have charge of the coal yard, check all incoming merchandise, and see that this is delivered to the proper warehouse. In addition to the duties outlined each partner is to attend to such other duties as shall be deemed necessary for the successful operation of the business.
9. Neither partner is to become surety or bondsman for anyone without the written consent of the other.

IN WITNESS WHEREOF, The parties aforesaid have hereunto set their hands and affixed their seals on the day and year above written.

C. W. Keeland [Seal]
A. D. Munson [Seal]

§ 204. **The contract.**—Written articles of copartnership should contain the following stipulations, with such additional provisions as may be applicable to a particular undertaking:

1. Date.
2. Names of the partners.
3. Statement that they are to be partners.
4. Nature of the business or undertaking.
5. Duration of the relation.
6. Name and location of the firm.
7. Capital stock, and each partner's investment.
8. Payment of expenses; sharing of losses.
9. Distribution of profits.
10. Right to withdraw money for private use.
11. Keeping of books or accounts.
12. Duties of the several partners.
13. Restraint upon partners as to becoming sureties.
14. Special provisions and stipulations.
15. Proper provisions for dissolution.
16. Division of assets after dissolution.

§ 205. **The firm name.**—A firm name, under which the business is transacted, is useful as a matter of convenience and identification, but is not a necessary feature of a partnership. In the absence of restrictive statutes, the business of the firm may be carried on under any name the members choose —provided it does not interfere with the rights of others; it may be a fictitious name, the names of the partners, or it may be the names of one or more of them. A partnership may act in the firm name or in the individual names of the parties.

The statutes of some states forbid the use of "& Co.," or "& Company" unless there is an actual partner. Likewise the use of the name of a retiring partner is forbidden unless the name has become a "trademark."

QUESTIONS FOR DISCUSSION
(Oral)

1. A capitalist and an electrician embarked in the radio business. The capitalist invested $10,000 and the electrician nothing except that he should use his knowledge to the best

advantage in the business. Is this a partnership? Explain.

2. X, an astute business man, who accumulated a "fair fortune," invites you to join him in a partnership business. You are asked to invest $20,000. The returns of X's previous business venture amounted to 25% on the capital invested. Will you join him? State your reasons for or against.

3. A child prodigy and a Mr. Barr formed a partnership for the purpose of selling musical instruments. When the liabilities exceeded the assets by a large sum, the prodigy left Barr. What are the rights of the respective parties?

4. Discuss the advantages and disadvantages of partnerships.

5. What are the limitations, if any, as to the nature and character of the activities in which a partnership may engage in carrying on business.

6. Ross, by letter, invites Bills to join him in a partnership business which is to extend over a period of two years. Bills wrote an affirmative reply. Discuss the validity of this agreement.

7. Doe and Roe agree in writing to become partners. Each agree to invest $3,000 as capital for the firm business. Neither one of them furnishes any capital, and no business is done in the firm name. Is this a partnership and are they partners?

8. A large wholesale grocery firm is said to be a partnership. It is known as the Puritan Grocery Co. What name may a firm use? Is it necessary that a partnership have a name?

9. Sampson and Thompson entered into written articles of copartnership January 1, 1900, for a period of five years. They are still doing business without having made a new agreement. Are they partners?

10. "It is the duty of every partner to conduct the business of the partnership for the common benefit of all the partners, and use his best skill, care and judgment." Discuss fully the meaning of this statement. (295 Ill. 22.)

CASE PROBLEMS
(Written or Oral)

No. 214

Lane and Roe are joint owners of a boat. Lane hires a third person to make needed repairs. Is Roe bound to pay if Lane is financially unable to do so? (8 Maine 138.)

No. 215

A and B signed a paper in which they agreed that they were not partners. The agreement among other things intended that the parties should run a hotel on joint account, sharing profits and losses equally, with authority to act in each other's behalf. Are they partners? (45 Mich. 188.)

No. 216

Harrison's election was celebrated by the Whigs at Iron's tavern, Pittsburgh. Arrangements were made by a committee of thirteen men. More than four thousand people partook of the dinner, but later, no one willing to pay the bill could be found. To whom may the proprietor look for payment?

No. 217

A partnership firm is promised a contract for building a sewerage system. The partner in charge of the negotiations encountered some difficulties in getting the contract. He secretly managed to get the contract in his own name, and kept all the proceeds for himself. Must he share with his partners? (89 Fed. 140.)

Chapter XXXVII

RIGHTS AND DUTIES OF PARTNERS

Keep in mind these questions when studying this chapter:

1. **In what ways may one be liable as a partner by implication?**
2. **What are the duties of partners to each other?**
3. **Is there a distinction between trading and non-trading firms?**
4. **What is the extent of a partner's authority?**
5. **To what extent is a partner liable for the debts of the partnership?**

§ 206. **Partners by implication.**—If a person so conducts himself as to justify others dealing with a firm to believe that he is a partner, he will be held liable as such. If one lends his name as a partner, or declares that he has an interest in the business, or permits his name to appear in the advertising matter without attempting to prevent it, he will be liable as a partner upon the principles of public policy to prevent fraud. This liability may also arise when a partner retires from a firm without making his retirement known to those who had former dealings with the partnership.

The acts or representations of one person cannot make another liable without his consent or co-operation, either by word or act; nor is he liable to creditors who in truth knew he was not a member of the firm. The use of another's name, without his knowledge, cannot subject him to liability; the holding out must be without protest on his part.

§ 207. **Test of a partnership relation.**—When a partnership exists between the members themselves, then it must exist as to third parties. It is more difficult, however, to determine what constitutes a partnership by implication. There are no prescribed acts which constitute such conduct as to induce others to believe that one is a partner, causing him to be liable to third parties; nor is there a prescribed test for determining a partnership. It must, as a rule, be determined in such cases by the particular circumstances involved.

At one time it was held that the sharing in the profits of a business constituted one a partner, but that is not a sure test, although it might be evidence of it. To share profits and losses would be still stronger evidence. If the sharing of profits is merely as wages, or compensation for service, then a partnership liability does not exist.

A sailor shipping on a whaling voyage was to receive a share of the oil for his services. He took it as a servant and not as a partner. (4 Esp. 182.)

Beecher rented a hotel from Bush, agreeing to pay daily a sum equal to one-third of the gross receipts. They were not considered partners. They were landlord and tenant. (45 Mich. 188.)

By contract, King was to furnish Nolan a stock of goods and keep it replenished; it was to remain King's property, but Nolan was to sell the goods, turning over all the cash received each day and drawing $50.00 per month. At the end of a term the latter was to stand one-third of the loss, take one-half the profits in merchandise on hand. They were partners, as they were carrying on the business in common as proprietors. (243 Mass. 111.)

Anderson loaned Smith a sum of money to start the latter in business. Anderson was to receive, in lieu of interest, a percentage of the profits of the business. Anderson was not Smith's partner, nor was he liable as such to the creditors.

The owner of a farm leased it and furnished the stock and one-half the seed grain, and in return he was to receive one-half the profits. This did not constitute a partnership, but the parties were co-tenants in the products of the land. (68 N. W. 240.)

§ 208. **Joint adventure.**—A joint adventure is formed for the transaction of some single piece of business. This does not constitute a partnership. A and B buy a tract of land as an investment; or contract, as mechanics to finish a house; or promote some financial enterprise. A single transaction of this kind does not contemplate a partnership. It is true they are co-owners in the undertaking but they are not partners.

§ 209. **Partnership property: capital.**—The capital of a firm is the total contributions made by all the partners to the common fund, for the purpose of carrying on the business of the partnership. A partner's investment need not be in money, but may be in the form of property, patents, trade-secrets, good-will, or anything of value; even the use of one's own name may be considered as a valuable asset.

The contributions of the partners need not be equal; one may furnish money or property, while another may give time,

skill, or experience. The right of any partner to increase or diminish his investment to the capital of the firm is subject to the consent of the other partners. All the partners are presumed to have equal rights in the use of the capital of the firm, but upon dissolution it is returned to the partners—after the debts are paid—in the same proportions as it was invested, so that, if one merely contributed his skill or services, he would not participate in the distribution. Sometimes the use of property is invested, the title remaining in the name of the individual partner, and upon a dissolution such property would be returned to the one holding the title.

Partnership property includes the property, or anything of value, acquired with partnership money or property, or which belongs to the partners as a firm—unless there is an understanding or agreement to the contrary. Property bought with the firm's money, but in the name of one of the partners, is considered partnership property. Each partner is entitled equally to the possession of the property of the firm, one as much as another.

Land was bought by parties in undivided ownership before a partnership was formed between them. The property was bought with individual funds and no entries were made on the firm books showing that the land was regarded as partnership capital although it was used by the firm in conducting a mill. The court ruled that "where persons, who afterwards become partners, buy land in their individual names, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of an agreement subsequently entered into by them to make it firm property." (153 Ill. 244.)

§ 210. **Good faith.**—The relation constituting a partnership is one of trust and confidence; each partner owes to his copartner the exercise of the highest integrity and good faith. A partner will not be permitted to receive the benefits of a firm bargain for himself alone, without the consent of the other partner or partners. Therefore, one of them cannot secretly renew the partnership lease in his own name. And if a lease is taken in the name of an individual partner, the benefit will go to the entire firm.

A partner will not be allowed to engage in any other business if it competes with the firm's business, or in any way disables him from performing his duties as a partner, unless

there is an agreement to the contrary. Nor can he lend to himself the firm's money without consent of his copartners. Of course a partner may receive any personal advantage or profit outside of the affairs of the firm with which he may be connected, without having to account to the firm for it.

One of the members of a partnership operating a hotel, without the knowledge of his copartner, obtained a new lease in his own name for a term of years commencing when the old lease expired. Suit was brought to have this lease declared the property of the partnership. The court held that the defendant took advantage of his position to obtain the new lease, and that it should be held for the benefit of the firm. (61 N. Y. 123.)

§ 211. **Management.**—Unless they have stipulated otherwise, it is the right of each partner to have an equal part in the management of the business in which they are engaged; to have free access to the books; to participate in all the affairs of the firm and see that they are properly conducted in accordance with the partnership agreement. In other words, one partner has no more authority than another; or, to put it affirmatively, each partner has as much voice in the management as any one of the other partners has.

On the other hand, they may agree that one or more of them shall have more control over the business, or certain parts of it, than the others, or even that some of them shall have no authority in any part of the management at all.

§ 212. **Compensation.**—Unless they have mutually agreed otherwise, a partner is not entitled to compensation for services rendered the firm. A partner must be contented with his share of the profits. This is so even though his services may be more valuable than those of the other partners, either in promoting the interests of the firm or in being more active in conducting the business. If one partner is to do more than his share of the work, it may be agreed that he is to receive extra compensation. Also, if one of the partners should purposely neglect his duties, the copartner would be entitled to more than his proportionate share of the profits.

Ammon and Saylor were partners engaged in the real estate business. Their agreement provided that each partner was entitled to compensation in the form of five per cent commission on sales. Each partner is entitled to the extra compensation under this agreement. (111 Ill. 662.)

§ 213. **Trading and non-trading firms.**—A partnership may be formed either as a trading or a non-trading concern. In a trading partnership, the firm is engaged in buying and selling, or manufacturing, as a business; and if not so engaged, it is a non-trading partnership, sometimes called a "partnership of occupation." The distinction is important in order that one may know the powers of a partner in creating partnership debts and the issuing of firm notes. Partners engaged in trade have an implied authority to bind each other by promissory notes executed in the firm name. In a non-trading partnership the partners have no such implied authority.

Illustrations of a partnership composing a trading firm would be such as are engaged in conducting a grocery store, whether wholesale or retail; dealers in cattle, hardware, or lumber; merchant tailors. A non-trading firm would be one composed of lawyers, physicians, printers, dentists, barbers, or hotelkeepers, and the like.

Thacker, Webster, & Ellison were engaged in the real estate, insurance, and collection business. Webster, one of the partners, purchased lumber in the name of the firm, to repair houses of which they had charge, and gave the firm name for it. It was held that the business they were engaged in was not of such a nature that one of the partners could bind the others by a promissory note. (78 Mo. 128.)

§ 214. **Authority of partners to bind the firm.**—The rights and liabilities of the partners may be limited or restrained among themselves as they see fit. In the absence of an agreement, each partner has the implied authority to bind the firm and with it the individual members and property, by any act within the scope of the partnership business, in dealings with third parties. And even should there be an agreement restricting their authority, third parties will not be bound unless they have had notice of such limitations. Partners being the agents of the whole partnership, are presumed to have full authority; and every person with whom a partner deals in the way of business has a right to consider the latter as the company. The law, therefore, provides that:

(1) A partner may compromise and release a firm claim, even though he accepts a nominal amount.

(2) One partner may receive the money due the firm and give receipts and the other partners will be bound, though he never turns in the money.

(3) He may make contracts, whether good or bad, if within the scope of the business.

(4) In a trading firm, he may borrow money in the firm name, give promissory notes, and mortgage and pledge the personal property of the firm.

(5) He has authority to sell a part, or the entire stock of goods at one sale and warrant the same. He may also transfer the property in payment of the firm's debts.

(6) Each partner may buy goods on the firm's credit, even though such act runs the partnership into overwhelming debt.

(7) He may insure the property, cancel the policy, collect the losses.

(8) A partner has the right to draw checks and to indorse and cash checks drawn in favor of the firm name.

(9) One partner may engage employees, appoint agents, and make contracts with them that will bind the firm.

(10) He may make declarations and admissions adverse to the interests of the firm. Notice to one of the partners will be notice to them all, and a demand on one is a demand on all of them.

§ 215. **Partners without authority to bind the firm.**— (1) A partner does not have the implied power to submit the controversies of his firm to a stranger for arbitration—but must have the consent of his copartners.

(2) Neither can a partner bind the firm by a contract of guaranty or suretyship.

(3) One partner has no authority to bind his copartners by a deed to real property, or to make a lease.

(4) A partner cannot bind the firm in the purchase of goods not connected with the known business of the partnership; neither can he sell property not held by the firm for sale, nor can he sell to himself.

(5) He cannot discharge a private debt by agreeing that it shall be set off against one due the firm.

§ 216. **Partners jointly liable.**—Partners may make such agreements as they choose among themselves as to their individual liabilities for partnership debts, but such agreements will not release them as to third parties.

The firm's property, both real and personal, is liable for the payment of the partnership debts, and if there is not sufficient partnership property to satisfy the firm's debts, then the individual property of each partner may be taken to pay the same. As a general rule, however, the individual creditors have priority in the satisfaction of their claims against the separate estates of the partners. If one partner should advance more than his proportionate share, he has a right to recover the excess of his share, ratably, from his fellow partners.

A partner cannot escape his liability by withdrawing from the firm or by selling his interest. He will, unless released by the creditors, still be liable for debts contracted while he was a partner. Nor will an incoming partner be held responsible for debts of the old firm incurred previous to his admission, unless he expressly assumes such liability.

The partnership will be liable for fraud, misrepresentation, or other wrongful act of a partner done in the ordinary conduct of the business even though the partners knew nothing about it. But the copartners are not bound by illegal contracts made by a partner, as persons entering into such contracts are presumed to know the law, and contracts contrary to law cannot be enforced.

A partner, while engaged in collecting debts due the firm, carelessly or wantonly ran over the plaintiff and seriously injured him. The partnership was held liable. (31 N. E. 412.)

Brown borrowed money from Smith for partnership use and agreed to pay an illegal rate of interest. The firm was not bound because it was in violation of law.

Plaintiff, a woman, placed in the hands of a member of a real estate firm a sum of money to pay off an encumbrance on her property. This was unknown to the other members of the firm. One of the defendants used the money in private speculation and lost it. The partnership was liable for the loss. (144 Pa. St. 304.)

QUESTIONS FOR DISCUSSION
(Oral)

1. Lynn bought property for the partnership and took a secret commission from the seller. What must he do under the circumstances? (107 Mass. 95.)

2. Allen allowed his name to be used on an electric sign

of a certain firm with which he had no connection. Can he collect a part of the profits of the firm? He is known as what kind of a partner?

3. Same facts as above. Allen's financial rating and reputation in the community is of the highest order. A citizen relying on Allen's apparent connection with the business extends credit to the firm. If the firm does not pay, can the citizen collect from Allen?

4. Wells and Wells are associated together in a manufacturing business, and have agreed among themselves to give their net profit to the Old People's Home. Is this a partnership?

5. A, B, and C entered into an agreement by which C was to buy used automobiles and ship them to Omaha. A and B agreed to sell them as soon as possible after their arrival. The profits were to be split three ways. Nothing was said as to the nature of the relationship of these parties. A partnership was not contemplated. What sort of a relationship existed here?

6. Dorman and Binney, partners, bought a piece of land. The deed conveyed the land to "D. B. Dorman and Company" as grantees. In what way should the deed have been made? (35 Minn. 357.)

7. A clerk allowed himself to be introduced to a traveling salesman by the owner of a business, as "my partner, Mr. Watson." Is he liable to the salesman as a partner? (67 Ga. 541.)

8. W. Hustler and I. M. Sleepy are partners conducting a garage and a sales agency. Nothing has been said in their agreement as to the divisions of profits. Hustler is responsible for $8,000 of the earnings, Sleepy for $2,000. How will they share the profits?

9. A clothing firm had placed an order for raincoats. Prior to filling the order, one of the members of the firm, without the knowledge of the other partners, changed the order. Is the partnership bound by the act of the partner?

10. Contrary to the partnership agreement which forbade a member of the firm to make purchases on credit, a credit purchase was made by him. The firm refuses to recognize this contract. What is their liability? (7 N. C. 4.)

CASE PROBLEMS
(Written or Oral)

No. 218

Defoe, the owner of a manufacturing plant, entered into an agreement with Dickens to manufacture certain articles for the latter. Under their contract, Dickens was to pay the wages and expenses of running the plant, while Defoe was to hire and discharge the employees. What was the relation between Defoe and Dickens? (68 N. W. 240.)

No. 219

Stewart and Wallace entered into an agreement to conduct a drygoods store in the name of Stewart, who was to furnish all the capital. Wallace was to act as the manager and receive for his services one-third of all the profits. Does this arrangement constitute a partnership? (67 N. W. 336.)

No. 220

Larkin sold his business to Clark, on terms providing that Larkin was to receive, for a period of years, a definite share of the net profits of the business. Does this constitute a partnership between Larkin and Clark? (145 U. S. 611.)

No. 221

Andrews and Shepherd are partners in conducting a grocery store. During July and August, Shepherd is ill and has to go to a hospital. Shepherd's share of work is all thrown on Andrews. Is Andrews entitled to compensation for the extra work performed? If additional help had been employed to do Shepherd's work, could Shepherd have been held individually liable for it, or should it have been paid out of the firm's money? If Shepherd had gone away on a pleasure trip, and Andrews had to do all the work, would he have been entitled to extra compensation?

Chapter XXXVIII

DISSOLUTION: SPECIAL PARTNERSHIPS

Keep in mind these questions when studying this chapter:

1. **In what general ways may a partnership be dissolved?**
2. **What notice of dissolution must be given?**
3. **How is a limited partnership formed, and why?**
4. **What are some of the features of a joint-stock company?**

§217. **How dissolved.**—There are three general ways in which a partnership may be dissolved. They are:

(1) By acts of the partners.
(2) By a decree of court.
(3) By operation of law.

(1) *By acts of the partners.*—The common method of dissolving a partnership is by acts of the partners. This may be brought about in any one of the following ways: (a) agreement, (b) withdrawal, (c) alienation.

(a) *Agreement.*—Partnership being founded upon a contract, it may be terminated the same way. The time may be fixed at the formation of the relation, or at any subsequent period. If no time is set, it may be ended at will by any of the partners.

(b) *Withdrawal.*—Even though the partnership is for a definite time, a partner may withdraw before the expiration of that time and thus cause a dissolution. One cannot be compelled to be a partner against his will; but if he withdraws from the firm before the time agreed upon, and without the consent of the other partners, he will be liable to them for any loss they may sustain by his act.

(c) *Alienation of partner's share.*—The sale or assignment of a partner's entire interest in the firm, under the common law, dissolves the partnership, but under the Uniform Partnership Act, the remaining partners have a right to demand a dissolution.

(2) *By a decree of court.*—A partnership may be dissolved by ajudicial decree. If a partner wishes to withdraw before the expiration of the time agreed upon, he may seek to have a court dissolve the partnership relation and thereby escape liability for damages. To do this there must be a valid reason; a court will not interfere for a trivial cause. The usual grounds for a decree of court are: (a) misconduct, (b) inability to act, (c) impossibility of success.

(a) *Misconduct of a partner.*—A court will act where one of the parties practices fraud on the other members of the firm, or when he is guilty of habitual intoxication, or gross immorality, is convicted of crime or other misconduct; but the complaining party must not be the one guilty of the wrongdoing. Continual quarreling has been held as a sufficient reason.

(b) *Inability to act.*—When one of the partners is to furnish the capital and another the skill, if the one furnishing the capital should be unable to keep his agreement or the one having the skill should become sick or otherwise incapacitated, a court will order a dissolution. Long and continual absence from the business, or the engaging in a rival business by one of the partners, or his permanent insanity, would be grounds for a dissolution.

(c) *Impossibility of success.*—If the undertaking is impracticable or incapable of being put into operation, or if put into operation it would result in serious loss and bankruptcy, the court will dissolve the partnership. So, also, if dissension arises among the partners of so serious a consequence as to make it impossible to continue longer, legal dissolution is allowable.

(3) *By operation of law.*—The events that will dissolve a partnership by operation of law are: (a) death, (b) bankruptcy, (c) war, (d) illegality.

(a) *Death.*—The death of a partner immediately dissolves the partnership relation. In some states where a partnership is formed for a definite period of time, it is permissible to provide in the agreement that upon the death of one of the partners his personal representative may carry on the business in

connection with the remaining partners for a limited time.

(b) *Bankruptcy.*—The bankruptcy (financial death) of a partner, or of the firm, or an assignment for the benefit of creditors, dissolves the partnership.

(c) *War.*—A declaration of war between different countries, or in different parts of the country in which the partners are severally resident will dissolve the firm. After peace is restored the partnership may be resumed.

(d) *Illegality.*—In the event the business for which the firm was created, or the association itself be unlawful, the partnership is dissolved by reason thereof. Thus, the eighteenth amendment to the Constitution of the United States dissolved partnerships for the sale of intoxicating beverages.

§ 218. **After dissolution.**—When a dissolution occurs, the sole business of the partners is to wind up the firm's affairs. The property is to be turned into cash, the debts of the firm are to be paid, and the remainder of the money, if any, is to be divided among the partners.

If the dissolution was caused by the death of one of the partners, the surviving members have authority to do all those things necessary to settle the firm business. They may collect the money due, give receipts, dispose of the property, and complete unfinished contracts, but they cannot undertake any new business. They are merely agents of the late firm to collect its assets and pay its debts.

§ 219. **Notice of dissolution.**—Often when a partnership is dissolved, a new partnership is immediately formed, new contracts are made, and new debts incurred. Such changes may happen without the knowledge of outsiders who act upon the belief that it is still the former firm. Actual notice should be given to former creditors, and notice by publication to all others. This is necessary in order to relieve the retiring member from future liabilities.

A notice of dissolution will not be deemed necessary:

(1) To those who were the partners.
(2) When dissolved by operation of law.
(3) When dissolved by a judicial decree.
(4) When a dormant or secret partner retires.

SPECIAL PARTNERSHIPS

§ 220. **Limited partnerships.**—The various states have statutes that permit the organizing of limited partnerships. New York was the first state to pass such a statute. This form of partnership is not very common. In a general way these laws provide as follows:

(1) That certain persons may invest capital in a business and share in the profits, without being personally liable for the firm debts beyond the amount of their investment. Partners whose liability is thus limited are called "special partners."

(2) There must be at least one partner, called a "general partner," who shall be liable for the debts of the firm, the same as in an ordinary partnership.

(3) The investment of a special partner must be fully paid, generally in cash.

(4) A failure to comply with the requirements of the statutes makes the partners liable for debts the same as in an ordinary partnership.

§ 221. **Joint-stock companies.**—Joint-stock companies are authorized under the common law and are regulated by statute law. This plan of organization is principally adapted to small and compact bodies who desire to utilize some of the features of a corporation and still retain a partnership relation between the members. Joint-stock companies, as well as limited partnerships, have not gained in general favor; they have been largely supplanted by corporations. Some of the leading characteristics of a join-stock company are:

(1) Each individual member or shareholder usually is jointly and severally liable for all the debts of the firm contracted while he is a member, the same as a general partner.

(2) Actions are brought in the same manner as in an ordinary partnership, unless otherwise provided by statute.

(3) The capital stock is divided into shares which are transferable, and the transfer of a member's share does not dissolve the company. Neither does the death, bankruptcy, or admission of a new partner work a dissolution.

(4) An incoming member is not liable for the debts existing at the time of his admission.

(5) The business is managed by officers elected for that purpose by the shareholders. A member is not an agent of the company, unless selected as such, and has no authority to bind the company as in an ordinary partnership.

(6) A joint-stock company may be dissolved by agreement or by an order of court.

QUESTIONS FOR DISCUSSION
(Oral)

1. Adams and Smith executed a firm note payable to Smith, one of the partners. Smith cannot enforce this note against the firm. Why not?

2. In a trading firm, Doe without the consent of his partner, prepared the following note: "Pay to the order of John Doe, One hundred Dollars, etc. (Signed) Roe & Doe." Doe indorsed this note to Brown who did not know that Doe signed it for his own purpose. Can Brown collect from the partnership? On what theory?

3. A partnership balance sheet listed as assets $10,000; liabilities $12,000. One of the partners sold his interest to the remaining partners for $25. They received all of his "assets and liabilities." The business never regained a condition of solvency and the creditors seek to hold the partner who retired. Will they be successful?

4. Mand, McHen and Wade had been partners for years. Mand sold his interest to the other two, but allowed his name to remain on the firm stationery. The firm went into the hands of a receiver. The creditors brought suit against Mand. Can they recover? (111 U. S. 529.)

5. S and G were partners in the operation of a grocery store. They conveyed all the firm property and business to a

chain store grocery company. They also discontinued to buy or sell or to have a place of business. Thereafter, S unknown to G gave a note to Sterling in the firm name. Discuss the liability of G in the payment of this note. (93 U. S. 430.)

6. The majority of the partners of a mercantile business decided to change to an investment business. Can this be accomplished without the consent of the other partner? (32 N. H. 9.)

7. Brady and Grady each own a lot. They made an oral agreement to form a partnership for the purpose of selling both lots. Nothing was said as to the division of the profits. $2,500 profit was made on Brady's lot; $1,500 on Grady's lot. Grady insists that he is entitled to $2,000. Is his contention correct?

8. While most of the states have statutes permitting the forming of "limited partnerships," there are few firms operating under that plan of a partnership in many of the states. Explain why.

9. Explain the difference between a joint adventure and an ordinary partnership.

10. You were a member of a partnership. The firm dissolved and a new partnership formed. What procedure would you follow to exempt yourself from debts of the new firm of which you are not a member?

11. Roe and Bede were partners in the operation of an automobile accessory business. Roe was judicially declared insane. Does this dissolve the partnership?

12. Long and Bell are carrying on a grain and feed business as partners. Being in need of additional capital they form a corporation and sell shares in the business to three of their friends. Does this act create a new partnership?

13. What are the advantages and disadvantages of a "limited partnership"; a joint-stock company.

CASE PROBLEMS
(Written or Oral)

No. 222

Plaintiff and defendant formed a partnership for the purpose of conducting a mercantile business. Plaintiff invested $5,000 of the capital and defendant $2,500. Both gave their entire time to the management of the business, but there was no agreement as to how the profits should be divided. At the end of the first year, they determined to dissolve. The firm had on hand $2,000 of undivided profits. How much should each be entitled to receive from the profits, and the capital respectively? (15 Tenn. 160.)

No. 223

Manning, of the firm of Manning & Hart, sells his interest to Blackwell, the firm to continue under the old name. The new firm enters into a contract with Brown & Co., for merchandise. Brown & Co. had done business with the old firm and had no notice of Manning's withdrawal, though Manning had published a notice of the dissolution in a newspaper. The new firm failed and Brown & Co. brought suit against Manning. Can they recover and why? (91 Wis. 90.)

No. 224

Mulcahey, O'Brien, and Finnegan, were partners in conducting a grocery store. Each partner had a one-third share in the business. Finnegan died. What effect did this have on the continuance of the partnership? Under what conditions could Finnegan's widow be admitted into the firm and take over her late husband's share? (42 Ill. 343; 109 N. Y. 333.)

No. 225

A—— and B—— were partners. A——, without the knowledge or consent of his partner, made a bill of sale in the firm name, conveying the entire stock belonging to the firm to X——. Is this act valid? (30 N. Y. 101.)

Chapter XXXIX

CORPORATIONS

Keep in mind these questions when studying this chapter:

1. **In what ways do corporations differ from partnerships?**
2. **For what purposes may a corporation be formed?**
3. **Can you account for the rapid increase in the number of corporations?**
4. **How are corporations classified?**
5. **How is a corporation formed?**

§ 222. **Introduction.**—Business is conducted through three well-defined channels, as follows:

(1) Sole proprietor.
(2) Partnership.
(3) Corporation.

(1) *Sole proprietor.*—The oldest and simplest form of a business organization is that of the individual trader or sole proprietorship. Such a business unit consists of a single individual who carries on business at his own risk, and for his own personal profit.

(2) *Partnership.*—A partnership is based upon the principle that a number of individuals can, by their united efforts and capital, often achieve results which a single proprietor could never hope to accomplish. Since, in a partnership, each partner is individually liable for the debts of the firm, it became necessary to devise plans by which this and other objectionable features might be obviated. The modern law of corporations has partly solved the problem.

(3) *Corporation.*—A corporation is a device used to limit the risk of those who employ their property in various business activities. It is said to be "a legal person" entirely separate and distinct from the individual members who compose it. Furthermore, the private or personal property of the members cannot be taken for the payment of the debts of the corporation.

Some of the principal reasons for incorporating may be listed as follows:

(1) The possibility of securing large sums of money or other capital.
(2) Elimination of the liability of the individual members.
(3) Continuous succession.
(4) Ready transferability of ownership or shares.
(5) Possibility of better organization for its operation.

§ 223. **Early history.**—The word "corporation" is from the Latin, meaning a *body*. According to legal history, corporations are of ancient origin, being adopted from the Greeks by the Romans. The first corporations at Rome were formed for the regulation of trade and for the purpose of religion. It was from the Romans that the early provisions of the common law relating to corporations were borrowed. Lord Coke called them "the greatest idea ever conceived by human brain, save none." As early as the middle of the twelfth century a corporation was likened to a flock of sheep, which remains the same flock although particular sheep successively depart.

In the early history of America, corporations for business purposes were scarcely known. As late as 1829 it was stated that none existed during colonial times. This was not because the law did not permit them, but the business of the people did not demand them. With the progress made in discoveries, inventions, manufacturing, and commerce in general, corporations have become one of the great agencies of our modern commercial development. Corporations are today our most important form of business associations, measured by the value of their product. It is probable that they perform more than 50 per cent of the work of American business activities.

Instead of merely combining the numerical and productive capacity of a limited number of members, a corporation may combine the capacity of many hundreds, often thousands, of individuals. One corporation alone (The American Telephone and Telegraph Company) is reported to have over 400,000 stockholders.

(1) *Corporation activities.*—Corporations build, own, and control schoolhouses, colleges, hospitals, mills, factories, railroads, canals, steamship lines, banks, loan and trust com-

panies, mercantile associations, cattle companies, packing houses, and stockyards. Indeed, capital could not be secured in quantities sufficient to launch and maintain the great industries which exist around and about us, except through corporations.

§ 224. **Definition.**—A corporation was defined by the Supreme Court of the United States as "An association of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without the dissolution of the association."

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." (Chief Justice Marshall in the Dartmouth College case.)

A corporation differs from a partnership in the *manner of organization, methods of conducting the business, responsibility of investors, and the manner of dissolution.* It agrees in the object for which it is formed—the combination of capital for the mutual benefit of its members.

§ 225. **Classification.**—Corporations are classified as:

(1) Public corporations.
(2) Private corporations.

(1) *Public corporations* are such as are created for the administration of public affairs—governmental purposes—exclusively. A city is a typical illustration of a public corporation.

(2) *Private corporations* are of two kinds:

(a) Those created for social, charitable, or educational purposes; as an asylum or hospital, college, athletic club, and similar institutions. They are not formed for profit and have no capital stock.

(b) Those created for the private pecuniary profit of its members; a bank, manufacturing or mercantile establishment, railroad, and the like are common examples. They have a capital stock and are termed private business corporations. It is this class in which we are here particularly interested.

§ 226. **How formed.**—Today, corporations are formed under general laws. At one time charters were secured by

special legislation. This procedure led to abuses, privileges being extended to favored parties. In the absence of such discrimination, it would be impracticable for modern legislatures to pass enabling acts for each newly formed corporation.

The right to form a corporation extends to all persons who comply with the conditions of the law. In this country, a corporation is created by authority of the laws of the state in which it is organized. While the requirements differ in detail in the various states, the method of procedure is generally the same. The plan commonly followed is, for the parties desiring to organize, to execute and file with a public official, designated by the state, articles of association in which is set out:

(1) The name of the proposed corporation.
(2) The purpose for which it is to be formed.
(3) The amount of capital stock.
(4) The number of shares into which the capital stock is divided and the par value of the shares.
(5) The place of its principal business office.
(6) Its duration.
(7) The number of directors and the names of the persons selected as directors for the first year.
(8) The names and addresses of the subscribers with the amount subscribed, and actually paid in.

Ordinarily, the statutes provide that the articles of association must be signed and acknowledged by a certain number of persons making application for a charter, the minimum number required in most states being three. There may also be a specification that a designated number must be citizens of the state in which the articles of association are filed.

§ 227. **The charter.**—After filing the articles of association, a charter is granted. The charter is a written document setting forth the facts required by law, and is the corporation's authority for doing business. It gives the name of the corporation, the amount of the capital stock, the location, place of business, nature of the business, time of existence, and such other information as is required by the law of the state under which it is granted.

ARTICLES OF ASSOCIATION

Parker, David and Company of Detroit.

We, the undersigned, do hereby associate ourselves together for the purpose of forming a corporation under and by virtue of the laws of the state of Michigan. And we do hereby adopt the following as our articles of association:

Article 1. The name of the corporation hereby formed is Parker, David and Company of Detroit, Michigan.

Article 2. The object and purpose for which this association is formed is the manufacture and sale of chemicals and pharmaceuticals and all business incidental to such manufacture and sale.

Article 3. The amount of capital stock of this corporation is $125,000, and the same is divided into 5,000 shares of $25.00 each.

Article 4. The amount of the capital stock actually paid is $81,950.00.

Article 5. The names of the stockholders, and their respective places of residence, and the number of shares held by each are as follows:

Hervey C. Parker	Detroit	836
George S. David	"	330
John R. Grant	"	836
William H. Stevens	"	748
Harry C. Tillman	"	528

Article 6. The office for the transaction of the business of this corporation is located at the city of Detroit, county of Wayne, state of Michigan, and said corporation is to be carried on in said county of Wayne.

Article 7. The term of existence of this corporation shall be 20 years from the date of the execution of these articles.

Article 8. The conduct and management of the business of this corporation shall be controlled by a board of five directors who shall be elected from the stockholders of this corporation on the day of the execution hereof, who shall hold their office for one year and until their successors shall be elected. And the annual election of directors shall be held on the second Monday of January each year thereafter during the existence of this corporation.

Article 9. There shall be elected from said board of directors a president, secretary, and treasurer, whose duties shall be designated in the by-laws and not inconsistent with the laws of the state.

IN TESTIMONY WHEREOF, We the undersigned associating together have hereunto set our hands and seals on the 14th day of January, A. D. 1928.

Harvey C. Parker
George S. David
John R. Grant
William H. Stevens
Harry C Tillman

Acknowledgment.

STATE OF MICHIGAN, COUNTY OF WAYNE, ss:

On the 14th day of January, A. D. 1928, before me, the undersigned, a notary public, in and for said county and state, personally appeared Hervey C. Parker, George S. David, John R. Grant, William H. Stevens, and Harry C. Tillman, to me well known to be persons described in and who severally executed the foregoing instrument and acknowledged that they severally executed the same as their free act and deed for the uses and purposes therein set forth.

Henry Wiseman

Notary Public, Wayne County, Michigan.

§ 228. **Capital stock.**—The capital stock is the total stock (face value) authorized, although all of it may not be issued. The charter mentions the amount that can be issued, but it is not necessary to issue all of this unless required by state law. The capital stock is divided into a specified number of units of equal value called *shares of stock*. These shares may be of one dollar, ten dollars, one hundred dollars, or any other amount selected by the charter members, unless the statutes govern the minimum or maximum value of each share. The minimum number of shares that can be issued and the amount of capital required to be paid up are also fixed by statutory law.

QUESTIONS FOR DISCUSSION

(Oral)

1. Classify the following institutions as to their corporate character:

(a) A gas company.
(b) A business college.
(c) A theological seminary.
(d) A church.
(e) A fraternal and benevolent order.

2. In the absence of a valid legislative authority, but because of urgent necessity, the governor of a state granted the X Service Company a charter. May the company officially operate under this charter? (105 Mass. 519.)

3. In 2 Bulstr. 233, we read "Corporations are invisible, immortal; none can create souls but God, but the King creates them (corporations), and therefore they have no souls; they cannot speak, nor appear in person, but by attorney." Discuss the meaning of this quotation.

4. A Maine statute granted corporate powers to one person "his associates and successors." Could this person exercise corporate powers? (16 Maine 224.)

5. Five members of your commercial law class have decided to form a corporation for the purpose of manufacturing

toys. Outline the preliminary steps to be taken in the formation of such an organization.

6. A state constitution fixes a double liability on the owner of bank stock. Suppose the articles of incorporation and the statutes under which the bank incorporates are silent on the question of liability, what is the result? (207 U. S. 234.)

7. A corporation issued a number of bonds. Jones is the owner of five of them. On the date of maturity he demands his pay. Must the corporation pay?

8. A share of stock

(a) "Entitles the owner to control, to some extent, the management of the business."

(b) "Is a certificate of ownership."

(c) "Is worth the par value, no more nor less."

(d) "Represents its proportionate part of the value of all the assets of the corporation."

Indicate which of these statements you dispute?

9. Explain some of the advantages arising through the incorporation of a business now conducted by an individual. Are there any disadvantages?

10. John reports that he heard someone say that "unless there are more than ten people, it does not pay to incorporate." Do you agree? Discuss the possibilities.

11. From whom does a corporation get its power and authority to act as such?

12. Can a company be incorporated by an act of Congress or does every corporation have to apply to a state for a charter?

13. Consult a dictionary as to the meaning of a syndicate.

14. Can a corporation be formed to practice law or medicine?

CASE PROBLEMS
(Written or Oral)

No. 226

A corporation was formed to operate a hospital for charitable purposes. It charged those able to pay for services. By doing so would it lose its charter as a public corporation? (154 N. Y. 14.)

No. 227

The Farmers' Union Produce Co. perfected an organization similar to that of a corporation. The individuals operating this business did not do any of the things required by law toward securing a charter. What was their legal standing? (194 N. Y. 872.)

No. 228

Three persons meet and agree to form a corporation. They subscribe to the articles of association and apply for a charter. When does the corporate existence begin?

No. 229

The legislature of the state of New Hampshire sought to change a charter which had been granted by the King of England. The original charter prescribed twelve trustees; the new charter increased the number to twenty-one. Other radical changes were made. Can a state alter or amend a charter without the consent of the corporation? (4 Wheaton 518.)

No. 230

Smith subscribed for three shares of stock ($100 each), and paid cash for them. The business flourished and carried a large surplus. Smith, who was in need of ready cash, tendered his three shares to the corporation and demanded $330. How much must the corporation pay him? (98 Mo. 145.)

Chapter XL

CORPORATIONS: POWERS AND MANAGEMENT

Keep in mind these questions when studying this chapter:

1. **What are the ordinary incidents of a corporation?**
2. **What are ultra vires acts?**
3. **May a foreign corporation do business in another state?**
4. **How are corporations managed?**
5. **What is cumulative voting, and its purpose?**

§ 229. **Powers, rights and capacities.**—Under the common law, as soon as a corporation is formed, it acquires certain attributes which are necessary and inseparably incidental, such as:

(1) To have perpetual succession.
(2) To sue and be sued.
(3) To buy and hold property.
(4) To have a corporate seal.
(5) To make by-laws.
(6) To appoint and remove officers.
(7) To make contracts.

(1) *To have perpetual succession.*—The death or withdrawal of a member has no effect on the life of the corporation—it still exists. Death, desertion, or abandonment will not destroy it. The right of succession means merely for the length of time for which the charter was granted and not that it is immortal in the ordinary sense of the word. The better term would probably be, *continual succession.*

(2) *To sue and be sued.*—The organization can complain and defend in a court in its corporate name. Every corporation must have a name by which it can be designated, and under which it transacts business. It may not use a name other than that given in the charter, nor is it permitted to use a name previously appropriated by another firm or corporation which would lead to confusion, or interfere with their

property rights. Some states require the name to begin with "The" and end with "Company"; other states require the name to be followed by "Incorporated."

(3) *To buy and hold property.*—The corporation can acquire and hold such property as is necessary for the purpose of the corporation. The purchase or owning of real property is not an essential requisite to its existence, but the right is not denied unless restricted by the charter.

(4) *To have a corporate seal.*—Under the common law it was necessary to attest the acts of a corporation by a seal.

The Bank of Columbia, through a committee of stockholders, made a contract with Patterson to build a bank building. After its completion and acceptance by the bank they refused to pay for the work saying, "We never put our seal to the contract, and, therefore, you cannot hold us." The Court held that wherever a corporation is acting within the scope of legitimate purposes, parol contracts made by its authorized agents are binding promises of the corporation. (7 Cranch 299.)

(5) *To make by-laws and regulations.*—Such rules, not inconsistent with existing law, for the government and management of its business, are binding upon the members.

(6) *To appoint and remove subordinate officers.*—This includes such agents as the business shall require.

(7) *To make contracts.*—A corporation may borrow money, issue negotiable paper, mortgage its property, make contracts of sale and leases, and do all other acts as a natural person necessary for the furtherance of the purpose for which the corporation was formed so long as it acts within the scope of its authority.

§ 230. **Limited powers.**—Although a corporation is treated by law as a person, it does not possess the powers of a natural person. A corporation cannot engage in any other business than that for which it was formed. If created for the purpose of conducting a bank, it cannot engage in manufacturing or trading. The authority of a railroad company to buy lumber to build depots would not be authority to buy lumber to build farmhouses.

§ 231. **Ultra vires.**—An individual trader, or a partnership, may do anything not forbidden by law. A corporation may do only those things for which it was chartered. When a corporation does an act which it has no right under its charter to do, or in excess of the powers conferred upon it, the act or conduct is said to be ultra vires—beyond authority—and such an act is generally held to be void. In some cases, an unauthorized act is void, as in the case of an over-issue of capital stock.

It is generally held that neither party can enforce an executory contract which is ultra vires. However, when one side has performed his part of the contract the courts will not permit the other side to escape performance on the ground that the contract was beyond the powers of the corporation.

§ 232. **Foreign corporations.**—A corporation must comply with the laws of the state in which it does business. If it is a foreign corporation, it has no right to engage in business in a particular state without having complied with the laws of that state. A corporation is "foreign" in every state except the one under the laws of which it was organized.

The primary purposes of the requirements imposed upon foreign corporations as a condition precedent to doing business within another state are:

(1) To secure jurisdiction over the organization in case of litigation.

(2) To provide information in respect to the organization.

Foreign corporations are usually required to designate an agent within the state for the service of process; and also to file copies of their charters with certain state officials. A failure on the part of the foreign corporation to comply with the requirements subjects it to penalties, which vary in the different states.

§ 233. **Officers and agents.**—The affairs of a corporation are in charge of officers who are elected by the board of directors. The stockholders elect the board of directors and thus have indirect control of the corporation through their voting power. The directors are agents of the corporation and are responsible for its management. It is only through agents

that a corporation can act. Married women and minors may officiate as directors. The articles of association, or the by-laws, fix the number of directors and their qualifications.

§ 234. **Meetings.**—After a charter has been granted, the stockholders are called together for the purpose of electing a board of directors, and to transact such other business as may be necessary. The stockholders usually meet once each year for this purpose. The directors are subject to the regulations of the charter and by-laws. They manage and control the business activities and property of the corporation.

At the first meeting of the directors, they elect officers and take such other steps as may be necessary to organize the business of the corporation. Thereafter, they hold meetings in accordance with the provisions of the by-laws and as the necessities of the business may require.

Regardless of how large an interest a stockholder may have, he cannot take any part in the management of the internal affairs of the company, unless he is an officer or an agent. Each stockholder is entitled to as many votes as he holds shares of stock. If one or more persons own a majority of the stock, he or they can elect all the officers and thus control the policies of the company.

§ 235. **Cumulative voting.**—Some states provide for what is known as "cumulative" voting in the election of directors. By this means the minority stockholder may have some representation on the board of directors. Under the plan of cumulative voting each stockholder has the right to cast as many votes in the aggregate as shall equal the number of shares of stock held by him, multiplied by the number of directors to be elected. The whole number of votes may be cast for one candidate, or they may be distributed among two or more as desired.

A holds 200 shares of stock, and B and C together own 300 shares in a corporation having 500 shares. If three directors are to be elected, A can cast his 200 votes three times for one candidate, or 600 votes; and B and C would have a combined voting power of 900 votes with which they could elect two candidates by dividing their vote so as to give each 450 votes.

If a member does not wish to attend and vote personally, he may authorize someone else to represent him. This right is called a proxy. The authority for granting proxies must come from the statutes, charter, or by-laws.

PROXY

Know All Men by These Presents, That I, Peter Sterling, of Denver, Colorado, hereby delegate and appoint Andrew Jackson to be my substitute, agent, and attorney for me, and in my name and behalf, to vote at the election of directors or other officers, and at any meeting of the stockholders of the

EDISON ELECTRIC LIGHT COMPANY

as fully as I might or could do if personally present and acting in my own behalf.

In Witness Whereof, I have hereunto set my hand and seal this first day of February, 1928.

Witness,
Richard Roe

Peter Sterling [L. S.]

QUESTIONS FOR DISCUSSION
(Oral)

1. Suggest the names of several local corporations, and the business in which they are engaged. In what respect is the name suggestive of the character of the business?

2. There are ten stockholders in a corporation. If seven die and three sell their holdings, what is the result? (207 Mo. 54.)

3. The title of the following case suggests a question raised in a legal controversy. "Benevolent and Protective Order of Elks of the United States of America vs. Improved Benevolent and Protective Order of Elks of the World." (122 Tenn. 141; 118 S. W. 389.) What is the law in respect to the use of similar names.

4. Explain why three persons as partners would have a greater credit-standing with a bank than the same three persons would have if they were incorporated?

5. The New Electrical Supplies Company has been granted a charter to engage in the radio supply business. In the course of its business it buys batteries. Is this permissible?

6. Have any of these corporations exceeded their authority?

(a) A navigation company bought land for speculation.

(b) A corporation erected an office building larger than its immediate needs and rented the remainder of the building.

(c) An aluminum corporation bought a factory and a few adjoining lots, all of which was necessary for the present needs of the organization. (175 Ill. 125.)

7. The same corporation borrows money from Mr. Brown and gives him a ninety-day note. Is this within its authority?

8. A stockholder who owns fifty-five per cent of the stock, assumes the management of the business and proceeds to make contracts. Are these contracts binding on the corporation?

9. All of the stockholders of a corporation join in a deed by which they propose to convey a vacant lot to John Jones. Payment is duly made and Jones is given a deed. Was this a good conveyance?

10. If Mr. White owns fifty-one per cent of the stock of a corporation can he, if he desires, elect himself president?

CASE PROBLEMS
(Written or Oral)

No. 231

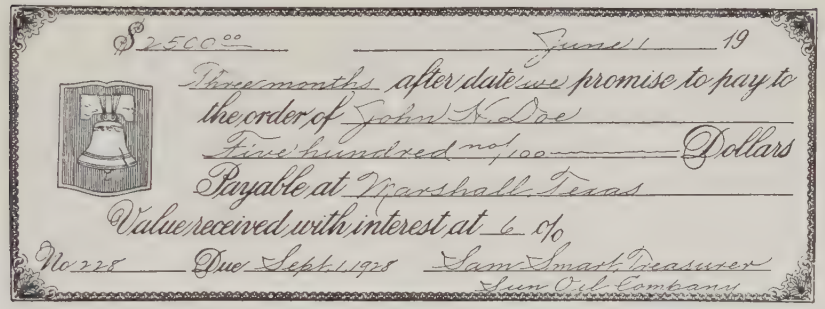
The Massachusetts Charitable and Mechanic Association, which was incorporated for the promotion of inventions and improvements in the mechanic arts, purchased land for the erection of a building for the purpose of holding exhibitions and meetings. The charter was silent on the question of the power to acquire real property. Is it within the power of the corporation to make the purchase? (131 Mass. 174.)

No. 232

John Miller, the holder of an accident insurance policy, was injured. The company refuses to pay. They produce evidence showing that their charter prohibits the writing of policies such as Miller holds. Does Miller have any remedy? (20 L. R. A. 765.)

No. 233

The treasurer of the Sun Oil Company gave the following note for the purposes of the company:


$2500.00 June 1 19
Three months after date we promise to pay to
the order of John K Doe
Five hundred no/100 Dollars
Payable at Marshall Texas
Value received with interest at 6 %
No 228 Due Sept 1 1928 Sam Smart Treasurer
Sun Oil Company

Who is bound by this note? Write the note as it should be.

No. 234

The Sunlight Publishing Company has five shareholders. Thackery owns fifty-one per cent of the stock. Can he elect all of the officers? If three directors are to be elected, how many can he elect if cumulative voting is permissible?

Chapter XLI

STOCKHOLDERS—THEIR RIGHTS AND DUTIES

Keep in mind these questions when studying this chapter:

1. **How is ownership in a corporation evidenced?**
2. **How do the stocks differ, and what are the advantages of each?**
3. **What are the rights and liabilities of stockholders?**
4. **In what ways may a corporation be dissolved?**
5. **Why are Blue Sky Laws enacted?**

§ 236. **Stockholder.**—One who owns stock—or shares—in a corporation is a stockholder or shareholder. As evidence of this ownership, he holds one or more certificates which show the number of shares he owns. It is not necessary (unless provided by statutory law) for the certificate to be recorded on the books of the corporation; but if the stockholder wishes to enjoy the privileges granted a stockholder, he must have his certificate registered so that the officers of the corporation will know who owns the various shares of stock. This information is especially necessary at the time a dividend is declared.

A stockholder does not own any part of the assets of the corporation, but shares with other stockholders in the distribution of these assets when the corporation is dissolved. If he wishes to dispose of his interest before dissolution, he can do so by selling his stock. The corporation is, itself, a legal entity, and the ownership of the business vests in it, and not in the stockholders.

A tract of land in Virginia was subdivided and sold. The deeds provided that "title to this land was never to vest in a person or persons of African descent." The People's Pleasure Park Company was a corporation whose stock was held entirely by negroes. This incorporation bought a part of the land to be used as an amusement park, exclusively for colored persons. Plaintiff brought suit to have the deed declared void, and the owners be restrained from the use of the property on the grounds that the corporation was "a person of African descent" within the conditions of the deed.

The court ruled that the conditions of the deed had not been violated. A corporation, being a person of its own individuality and iden-

tity, it does not partake of the qualities of its members. Notwithstanding every one of the members of the incorporation was a negro, this did not have the effect of making the People's Pleasure Company "a person of African descent." (109 Va. Rep. 439.)

§ 237. **Kinds of stock.**—The laws which create the corporation govern the issuing of stock. When a corporation issues stock, it expects to make a profit by the use of the capital raised by that stock. If it makes a profit it is divided among the stockholders. Such profits are called dividends. There are two general kinds of stock issued by corporations: common stock and preferred stock.

§ 238. **Common stock.**—All stock issued by a corporation is common stock unless otherwise designated. The owners of common stock share in the profits in proportion to the number of shares they own. The word "common" in this connection signifies that the holders are entitled to an equal pro rata division of the net earnings, if there be any. Thus, if a person owns one hundred shares in a corporation of one thousand shares, he will be entitled to one-tenth of the profit set aside by the board of directors for distribution. He receives the same proportionate part of the profit as the other stockholders, and does not enjoy any special privileges.

§ 239. **Preferred stock.**—Preferred stock is issued with a contract that a fixed per cent will be paid out of the income or earnings as a dividend. This is paid before the holders of common stock may participate in the dividends. In case the profit is not sufficient to pay the dividend on the preferred stock in full, the directors may declare only a part of it, but the claim of the preferred stockholders for the remainder of the dividend not declared cumulates, and the full amount of these cumulated dividends must be paid before any dividends are paid to the holders of common stock unless the stock provides otherwise.

If the earnings applicable to the payment of dividends are only sufficient for the fixed annual dividends, they will be entirely absorbed by the preferred stock. If they are more than sufficient, the surplus may be applied in paying dividends on the common stock. The contract between the stockholders and

the corporation usually states whether the stock is cumulative or participating or both.

The value of any stock depends upon the dividends paid, therefore, it is possible for the common stock to become more valuable than the preferred stock. If there is a large profit, and the amount set aside by the board of directors as a dividend pays the preferred stockholders their fixed dividend and the common stockholders a larger dividend, the common stock may be more valuable.

§ 240. **No par value stock.**—This is stock which does not state how much money it represents. It is not divided into shares of any specified amount. Its ownership entitles the holder to share in dividends. Those who are interested in becoming stockholders should investigate the financial condition of a corporation issuing this kind of stock before becoming shareholders. No par value stock is of recent origin, and is becoming more popular as time passes. However, its workings are not yet well understood, and the law in respect thereto is not fully developed.

Watered Stock.—Stock not paid in money or property is termed "watered stock." There are three methods of issuing such stock. (1) Where the shareholder buys a certain amount of stock at less than par value and a certificate is issued paid up in full. (2) Property at an exaggerated profit or inflated value has been given in exchange for certificates of stock. (3) Issuing stock dividends when none have been earned.

§ 241. **Dividends.**—A dividend is a corporate profit that has been set aside to be paid to the stockholders. It is very largely in the discretion of the directors whether dividends shall be declared when there is a surplus of profits on hand. The courts rarely interfere to compel the directors to declare a dividend, but they will do so when a failure to act works an injustice to the stockholders. If dividends are not declared, the profits become part of the assets of the corporation to be used in furthering the business. Until a dividend is declared, the profits do not belong to the individual stockholders.

A stockholder in a corporation that had accumulated a surplus of $150,000 brought a suit to have it distributed as dividends. Dividends had been paid the previous ten years at the rate of 25 per cent. It was held by the court that, as the surplus was profitably employed by the

directors in purchasing materials to be used by the company, the directors had not acted unreasonably or capriciously, but for the best interests of the corporation, and there should be no interference on the part of the court. (62 N. Y. 18.)

The declaring or refusing to declare dividends by the directors is not absolute. In the case of Dodge Bros. vs. The Ford Motor Company (204 Mich. 459), wherein this corporation, with a capital stock of $2,000,000, a surplus of $112,000,000 and profits of more than $59,000,000, declared a dividend of only $1,200,000 the court, at the instance of the minority stockholders, made an order for a further dividend of nearly $20,000,000.

§ 242. **Certificate of stock.**—The certificate of stock is the stockholder's receipt for the money he has invested. It is evidence of the holder's rights. It states the number of shares for which he has paid, the value of each, and is signed by the legally authorized officers. The par value of each share and the number of shares is shown in the certificate.

The following is the ordinary form of a stock certificate:

INCORPORATED UNDER THE LAWS OF THE STATE OF COLORADO

No. 21 — 1000 Shares

THE AUGUSTA METAL Mining Company

CAPITAL STOCK $2 000 000
2,000 000 SHARES $1°° EACH

THIS IS TO CERTIFY that J. Kruhbel is the owner of One thousand Shares of the Capital Stock of

THE AUGUSTA METAL MINING COMPANY,

fully paid and non assessable transferable only on the Books of the Company on surrender of this Certificate properly endorsed

(SEAL)

In Witness Whereof, the President and Secretary have hereunto subscribed their names and caused its corporate Seal to be hereto affixed at Cameron Colo this 16 day of May A D 19

J. Kruhbel Secretary — C. L. Azzino President

§ 243. **Rights of stockholders**—A share of stock represents a contract between the stockholder and the corporation and invests the holder with certain rights.

(1) He has the right to have issued to him his certificate for the number of shares to his credit on the books of the company, which gives him the rights and privileges of a stockholder.

(2) Shares of stock may be bought and sold like any other personal property. When so sold, the transferee (the purchaser) has a right to have the transfer recorded upon the books of the company and to have issued a new certificate or certificates. Until such entry is made, he is not entitled to dividends and other privileges. The officers of the corporation must make the transfer, although they may believe that the new ownership will be detrimental to the best interests of the company.

The plaintiff acquired shares of stock in the Standard Oil Company. He had previously written a pamphlet attacking the methods of that company and had thus made himself very obnoxious to the corporation. The officers refused to transfer the shares upon the stock books of the company on the ground that the plaintiff was hostile to the Standard Oil Company. Upon a suit being brought to compel the transfer, the court sustained the plaintiff's right and forced the recording of the stock. (134 N. Y. 174.)

(3) Stockholders have an undivided interest in the business, which gives them the right to attend meetings of the stockholders in person or by proxy, to vote for directors, to increase or decrease the capital stock (the right to acquire pro rata shares of such increase in the capital stock), or to make other important changes in the corporation.

(4) A stockholder has the right to participate in the dividends, if the same have been declared by the Board of Directors.

(5) When the corporation is dissolved, the stockholders have a right to participate in any surplus that may remain, to be divided in proportion to the amount of stock each member holds.

(6) Under such restrictions as the courts and statutes may impose, a stockholder has the right to inspect the books and accounts of the corporation. This demand must be made in good faith, at a reasonable time, and for a proper purpose.

§ 244. **Transfer of stock.**—The by-laws usually provide that when the certificate is sold by the stockholder to whom it was issued, the stock shall be transferable upon the books of the company so that the corporation may at all times know who are its stockholders, and as such, entitled to vote and receive dividends. The registered owner signs the blank form of indorsement on the back of the certificate and delivers it to the purchaser, who may then fill in his name as the assignee and as attorney to present it for transfer on the records of the company. The certificate is then canceled and a new one issued in the name of the holder.

"While the printed form of transfer with power of attorney, commonly placed on the back of a stock certificate, furnishes a convenient and appropriate means of transfer in the ordinary course of business, such transfer may also be made by delivery of unindorsed certificates together with specific assignments." (32 R. I. 72.)

FORM OF TRANSFER PRINTED ON THE BACK OF A STOCK CERTIFICATE

*For Value Received*____*hereby sell, assign and transfer to*

_____

_____

_____

the Shares of Stock within mentioned, and hereby authorize the transfer of the same on the Books of the Company.

*Witness*____*hand and seal this*_____*day of*

_____*19*__ _____[SEAL]

Witnessed by

_____ _____

§ 245. **Liability of stockholders.**—The members of a corporation are not individually liable for its debts, unless there is a provision in the charter or statutory laws creating such a liability. But if the stockholder has not paid to the corporation the full amount of his subscription, he is liable for the unpaid portion, if the amount is necessary to pay creditors.

If the corporation becomes insolvent and the assets are not sufficient to pay all the obligations, the common law holds each shareholder individually responsible for the value of the

shares which he owns. By statutes in some of the states, this liability has been increased to a certain amount over and above the common law liability.

The holder of national bank stock is liable for double the value of the stock. Stockholders in state banks may be subjected to a greater liability, according to the laws of the state under which they are organized.

§ 246. **Liability of officers.**—The officers are the agents of the corporation. If they exceed their authority, they are personally liable to third parties. If the officers are authorized to sign documents on behalf of their companies, they should sign the name of the company corporation and follow it with the signature of the president as its president, and of the secretary as its secretary; thus,

THE EDISON CONSTRUCTION COMPANY,

By Richard Roe
President.

By John Doe
Secretary.

§ 247. **Manner of dissolution.**—A corporation continues during the time stated in the charter. This may be for an unlimited time, or it may be for a definite number of years. If for a definite number of years, it may be renewed any number of times, so that it is sometimes said that "A corporation never dies." Nevertheless, a corporation may cease to do business, wind up its affairs, and voluntarily surrender its charter, with the consent of its stockholders, by complying with the statutes of the state. If the charter was granted to perform some specific act or for a limited period of time, it will cease upon the completion of the work or the expiration of the time. Under the statutes of some of the states, the charter may be withdrawn without legal proceedings. Such a dissolution can be brought about only where the legislature has reserved such a right prior to the formation of the corporation.

A corporation may be dissolved by a judicial proceeding as a penalty for: the doing of wrongful acts injurious to the public; the abuse of power, or where it has become insolvent or incapable of continuing business with safety to the public

or its creditors. For instance, a corporation formed for the purpose of conducting a race-track and fairgound but actually engaged in gambling, was held to have violated its franchise in such a manner as to justify its dissolution. Combinations to form monopolies, or unlawful trusts have been held to warrant a judgment of dissolution.

The death of all the stockholders in a business corporation does not end its existence. The shares of the several members pass, by bequest or descent, and thus belong to some person, who for the time will be a member of the corporation.

A corporation does not become dissolved merely by discontinuing its business. The cessation may be only temporary. Then again, the stockholders may decide to elect new officers and form a new management.

When a corporation is dissolved, either by a lapse of time or by the action of the stockholders, the directors wind up the affairs of the concern, sell all the property, pay all debts and obligations, and distribute the remaining assets as a dividend to the stockholders, in proportion to their stock holdings.

§ 248. **Blue Sky Laws.**[1]—The general intent of the so-called "Blue Sky" Laws is to prevent the sale of worthless or speculative stocks and bonds of foreign corporations by fakers and financial sharks, thus protecting the ignorant and unwary from losing money in either deliberately fraudulent, or highly speculative, securities.

While Blue Sky Laws are of recent origin, more than thirty states have adopted such statutes in some form or other. These laws usually provide that before an individual, corporation, or copartnership shall offer for sale any stocks, bonds, or other obligations of a foreign corporation, a statement of the responsibility of the seller and the general financial condition of the corporation must be filed with a designated state official and a permit or license be obtained. Before such license is granted, the official must investigate the merits of the securities offered for sale. Failure to obtain a license subjects the offending party to a fine, or imprisonment, or both.

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[1] Blue Sky Laws are so called in allusion to the remark of the proposer of the law in the Kansas legislature (the first state to adopt such legislation), that some companies sought to "capitalize the blue sky."

§ 249. Comparative Difference Between a Partnership and a Corporation.

Topics	Partnership	Corporation
Membership.	Two or more parties.	Subject to statutory regulations.
Creation.	Voluntary agreement.	By express authority of the state.
Entity.	Not a legal entity	Is a legal entity.
Capital Stock.	No limitations or restrictions.	Must be a certain amount and not less than a specified sum.
Changes in Capital.	Increased or diminished at will.	Only by express permission.
Ownership.	Title in members, personally.	Title in name of corporation.
Management.	Under direct authority of each partner.	Only through appointed officers and agents.
Litigation.	Sues or is sued in names of members.	Sues and is sued in its corporate name.
Rights and Powers.	Unrestricted, may do anything lawful.	Restricted, regulated by statutes, charter, by-laws.
Sharing of Profits.	Equally, unless otherwise agreed upon.	Dividends, declared at discretion of directors; proportioned according to shares.
Transfer of Interest.	Works a dissolution.	Transferee merely takes owner's place.
Written Records.	No requirements in most states (except for income tax purposes).	Certain books must be kept.
Publicity.	None.	Annual or frequent reports often required.
Taxes.	Ordinary taxes.	Special license, taxes, and fees.
Liability.	Jointly and severally liable.	Limited to capital and resources, unless otherwise provided.
Duration.	Limited.	Perpetual, unless otherwise limited.
Dissolution.	At any time.	Expiration or surrender of charter; judicial decree; legislative act.

QUESTIONS FOR DISCUSSION
(Oral)

1. Discuss why corporations are (a) beneficial, (b) detrimental to the common good of society.

2. You plan to invest money in a corporation. Before doing so it is advisable to determine whether you want common stock or preferred stock. What steps would you take to get the desired information?

3. Stock is now being offered in some corporations as "No par value stock." Can you suggest any reasons why you should investigate such stock before buying?

4. Smith has paid $2,000 for stock which represents his interest in a $10,000 corporation. He has never received a certificate of stock. Is Smith a stockholder?

5. The X Corporation has been operating at a loss for several years, but it has also continued to pay dividends by "milking" the capital. This, of course, caused the business to become insolvent. The creditors are now looking to the stockholders for payment. To what extent are the stockholders liable?

6. A minor may hold stock after a corporation is formed, but he cannot act as an incorporator. Can you suggest a reason for such a rule?

7. A national bank has a capital stock of $100,000. Its liabilities exceed the assets by $200,000. Does Jones, who owns two shares of $100 each, share in the loss?

8. The X. Y. Z. Company is indebted to you and refuses to pay. Why is it necessary for your lawyer to know whether the firm is a partnership or a corporation, if he decides to bring a suit for collection?

9. Several of your friends contemplate starting a manufacturing business. They are in doubt whether to form a copartnership or a corporation. After your brief study of the two forms of business organizations which one do you recommend, and why?

10. The Nonquitt Spinning Company is a corporation engaged in the manufacture and sale of cotton goods. At the end of the year there was a substantial surplus in the hands of the

treasurer. The directors decided to retain this surplus and not pay any dividends as in previous years. Several stockholders brought suit to compel the directors to declare a dividend. In your opinion what should be the decision of the court? (29 N. J. 504.)

CASE PROBLEMS
(Written or Oral)

No. 235

Shea was a stockholder in a corporation. He brought a suit to compel the company to permit him to examine the stock and transfer books. The company resisted on the ground that Shea was a stockbroker and wanted the information for his personal use. Result, and why? (234 Mass. 592.)

No. 236

An officer of a solvent corporation lent the corporation money and took as security a mortgage on the property in his own name. Later, the corporation became insolvent. What are the rights of the mortgagee? (161 N. Y. 571.)

No. 237

Smith, in good faith and for value, bought a certificate of stock from a thief. The certificate had been indorsed in blank by the owner. This indorsement was followed by that of the thief. Who is the owner of the stock? (50 N. H. 571.)

No. 238

D sold his stock in a railroad company to B, executing a power of attorney to B for the transfer of the shares. B took the certificate but neglected to make the transfer. After D's death, the administrator collected dividends on the shares and also procured a transfer of the shares to himself. B sued the company for the value of the shares and the dividends. What is your decision? (25 Hun [N. Y.] 438.)

No. 239

A subscriber for stock canceled his subscription shortly after the incorporation of the company but before it had started operations. Is this permissible? (96 Pa. St. 391.)

WILLIAM HOWARD TAFT

CHIEF JUSTICE OF THE UNITED STATES

[over]

WILLIAM HOWARD TAFT

CHIEF JUSTICE OF THE UNITED STATES

Born September 15, 1857, at Cincinnati, Ohio. Educated in the public schools of Cincinnati, including Woodward High School, Yale University, and Cincinnati College of Law. Admitted to the bar of the Supreme Court of Ohio in 1880. Appointed assistant prosecuting attorney, Hamilton County, January, 1881, resigning in March, 1882, to become collector of internal revenue for the first district of Ohio. Resigned following year to enter practice of law, continuing until 1887, holding in meantime office of assistant county solicitor, from January, 1885. In March, 1887, appointed by Governor Foraker judge of the Superior Court of Cincinnati. Elected the next year for five-year term. Resigned 1890, to become Solicitor-General of the United States under President Harrison. In March, 1892, appointed judge of the United States Court for the sixth judicial circuit and ex officio member of the circuit court of appeals. In 1896 became professor and dean of the law department of the University of Cincinnati, resigning both in 1900 to accept appointment from President McKinley as president of the U. S. Philippine Commission. Appointed first civil governor of the Philippine Islands on July 4, 1901. January, 1904, became Secretary of War in the cabinet of President Roosevelt. In 1906, visited Cuba in an endeavor to arrange peace, and acted for a time as provisional governor. Nominated for President of the United States in June, 1908, by the Republican National Convention at Chicago. Elected in November, receiving 321 electoral votes against 162 for William Jennings Bryan. Renominated in 1912; defeated in November of that year. Retiring to private life, became professor of law at Yale and lecturer and editorial writer. Appointed Chief Justice of the United States by President Harding June 30, 1921. Assumed duties on the bench October 3, 1921.

Chapter XLII

INSURANCE

Keep in mind these questions when studying this chapter:

1. **What is the general nature and origin of insurance?**
2. **What is the character of the insurer's contract?**
3. **How do types of insurance differ?**
4. **What are some of the common technical insurance terms?**

§ 250. **Nature and origin.**—Insurance is a name applied to a conditional contract or agreement whereby one party, for a stipulated consideration, agrees to pay another a specified sum of money upon the occurrence of a contemplated event. That event may be one likely to occur, as the loss or damage of property through fire, water, theft, or accident; or one certain to happen, such as death. It is always an event of which the time of occurrence cannot be foretold.

Under a system of insurance, protection is provided against the danger of some loss. For this purpose, a common fund may be accumulated by pooling small contributions from a large number of persons out of which a contributor is entitled to participate in case he has suffered a loss or damage. Thus, by dividing the risk among many, the proportion of cost that may fall upon any one person is very small. It will be noted that the payment of an insurance claim is possible only as a result of the combining of many small premiums collected from a large number of individuals.

Here is an army marching. If you place 500 pounds weight upon the shoulders of a single man you crush him to earth. But an additional one pound may be placed on the shoulders of each man of 500 and the army will still march on, and not feel the weight as an extra burden.

This is a comparative illustration of what insurance does. It will readily be seen that it is better to bear a certain small loss than to incur the risk of a large uncertain loss.

While the idea of insurance originated in the remote past —its beginning being more or less doubtful—its practice is a development of recent times. The oldest form of insurance

is doubtless marine insurance. It began with merchants who, in early times, usually accompanied the merchandise they shipped to Mediterranean ports. These merchants paid an agreed sum to certain individuals, who then guaranteed to pay ransom in the event of the merchant's capture by Moorish or other pirates who in those days swarmed the seas; or to pay a fixed amount to the merchant's family if he were lost. Gradually the field became widened and included the risk of loss through fire, shipwreck, or other hazards of the sea. From this practice has been evolved the modern principles of insurance, modified and adapted to meet every imaginable demand of our present industrial, commercial, and social needs.

§ 251. **Kinds of insurance.**—Insurance may be divided into two distinct groups:

(1) Property insurance.
(2) Personal insurance.

(1) *Property insurance.*—It is now possible to insure property against loss occasioned through almost any conceivable cause. The most common of the many risks insured against are:

(a) Loss or damage by fire, explosions, lightning, hail, riots, floods, burglary, and the like.

(b) Marine insurance, which applies to loss or damage to vessels and their cargoes, or other property exposed to the perils of navigation.

(c) Insurance of motor vehicles against loss or damage from collision, fire, theft, etc.

(2) *Personal insurance.*—There are numerous classes of personal insurance, of which the following are the most common and best known:

(a) Life insurance, which insures one person against loss by the death of another.

(b) Accident insurance, which provides for loss arising from accidental personal injuries, the amount to be paid varying with the character and severity of the injury.

(c) Credit insurance, which is issued to merchants to pro-

tect them from excessive loss due to the failure of debtors to pay their obligations.

(d) Employer's liability insurance, which insures against loss for injuries to an employee and for which the employer is liable.

(e) Fidelity and surety insurance. Fidelity insurance, which is for the purpose of protecting the insurer against loss arising from the default or dishonesty of an employee. Surety insurance, which is protection against the non-faithful performance of any service or contract.

(f) Title insurance, which provides protection against loss arising from a defective title or interest in real property.

(g) Automobile liability insurance, which insures an owner of a motor vehicle on account of any bodily injuries or death he may accidentally cause to others or himself, while operating a car.

§ 252. **Insurance terms in common use.**—The party or company agreeing to make good the loss is the *insurer*, often called the *underwriter*; the other party is called the *insured*, and is known as the *policyholder*. The *beneficiary* is the person named in the policy to receive the benefits or proceeds that may accrue thereunder. The written contract containing the terms of the agreement is called the *policy*. The *face* of the policy is the sum to be paid by the insurer; the *premium* is the consideration paid by the insured; while the event insured against is the *risk* or *peril*; and the subject, right, or property to be protected is the *insurable interest*.

§ 253. **Kinds of companies.**—The two chief kinds of companies engaged in the business of insuring are:

(1) Stock companies.
(2) Mutual companies.

(1) *A stock company* is one owned and managed entirely by the stockholders. They contribute the capital, pay the losses, and share the profits. The policyholders, unless they are also stockholders, have no voice in the management of the company. In such a company the premiums are at a regular fixed rate.

(2) *A mutual company* is one which has no capital stock, and in which the management is controlled by the policyholders through officers and directors elected by the members. The members are both insurers and insured. They contribute to a fund to pay losses and expenses, and divide the profits in proportion to their respective interests. Fixed premiums are charged, and assessments are made to meet annual losses or other expenses.

§ 254. **Formation of contract.**—An agreement to insure property need not be in writing in order to bind the insurer, unless required by statute or the corporate charter of the company issuing the policy. In many of the states the laws provide that in fire insurance a certain form known as a *standard policy* must be issued. Since it is almost a universal custom to use written policies, the presumption would be that when no policy has been written and no premium paid, there is no contract of insurance.

Oral contracts are sometimes made in contemplation of the issuing of a written policy. Upon an application being made for fire insurance or where an agreement has been entered into but the policy is to be issued later, the agent may issue a receipt termed a *binder*. A binder will enable the insured to enforce his contract in case of loss before the policy is issued.

§ 255. **Who may be insured?**—With a qualification hereafter mentioned, there is no difference between a contract of insurance and any other contract, in so far as the capacity of the insured is concerned. The contracts of an infant are voidable, hence, an infant may avoid at his option, an insurance contract. Should the infant elect to avoid such an agreement he cannot recover the premiums paid, unless they more than pay for the insurance protection he has actually received.

An application to be "insured" is no more than a proposition to the insurance company, and necessarily it must first be accepted before there can be a "meeting of minds" so as to form a binding contract.

Where the written proposal states the time and manner for the proposition to ripen into a completed contract, these conditions must transpire before the contract takes effect. (18 West Va. 782.)

The insured had entered into an agreement with the agent of an in-

surance company that the insurance was to take effect at a certain time, at a specified rate, but the policy was not delivered until after a loss by fire. The company was held liable since there was a valid parol contract for insurance. (56 Iowa 508.)

QUESTIONS FOR DISCUSSION
(Oral)

1. It has been said that "an insurance contract is a gamble; it depends upon an uncertain event. It is a wagering contract." If this is so, how is this "wagering contract" (insurance contract) to be distinguished from any other illegal contract?

2. (a) Jones wagers five dollars with Wall that it will not rain Sunday.
   (b) A manager of a baseball team buys $2,000 worth of rain insurance for Sunday. Premium $75.
   Why is the one contract illegal and not the other?

3. Adams buys a life insurance policy in which Mrs. Adams, his wife, is named the beneficiary. Who is insured against loss?

4. Two agents make an effort to sell you fire and tornado insurance. One represents a company whose policyholders are scattered throughout the United States; the other represents a company 90 per cent of whose policyholders live in the same city. Both are mutual companies. Which agent will get the business?

5 Sherwood called up an insurance agent for the purpose of buying automobile insurance. The conversation resulted in the purchase of a fire and theft insurance policy. The automobile was destroyed by fire before the policy had been delivered. The company refuses to pay the loss. What are Sherwood's rights?

6. A life insurance company sought to hold an infant to his contract. What must the company show in order to hold the infant liable? (56 Minn. 365.)

7. An infant had his home and store building insured. May he avoid this contract?

8. Ten persons incorporate and form an insurance company, each investing $10,000. The new company has not succeeded in writing any policies excepting to its own members. What is the status of this company; is it a stock or mutual company?

9. John Brown is the owner of a grocery business in which he employs:

(a) One general manager.
(b) Two bookkeepers.
(c) Twelve clerks.
(d) One cashier.
(e) Three truck-drivers.
(f) One janitor.

Select from the list given in the text the kinds of insurance Brown should have in order to be completely protected.

10. Jones individually guarantees the payment of losses that may occur in return for a fixed premium. May Jones legally act as an insurer? Would you buy a life insurance policy from him?

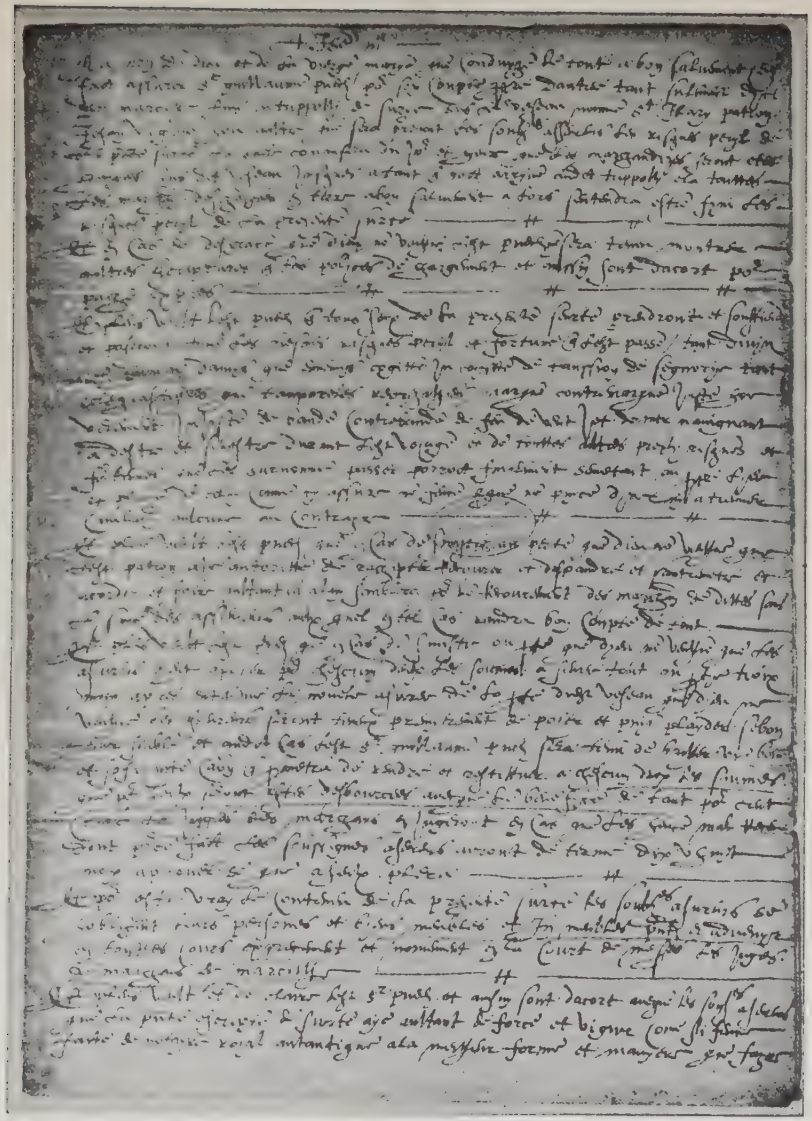
CASE PROBLEMS
(Written or Oral)

No. 240

X has agreed to defend certain physicians and surgeons against prosecution for malpractice, but does not agree to pay judgments recovered against them. Is this a contract of insurance? (73 Ohio St. 90.)

No. 241

A house mover has contracted to move a house. After expending money in preparation, he learns that the insurance policy on the house has lapsed. May the house mover insure this house in his own name? For how much? (31 Iowa 464.)



Courtesy Lloyd's, London.

INSURANCE POLICY 1586

[over]

OLDEST MARINE INSURANCE POLICY

Through the courtesy of Lloyd's List and Shipping Gazette permission has been granted to reproduce the photograph of a policy on goods in the ship *St. Ilary,* made at Marseilles in the year 1586.

In itself the policy contains many points of interest. It is an exceedingly pious instrument. Not only does it begin "In the name of God and of the Virgin Mary," but ejaculations of "May God save it," "May God forbid," are scattered thickly over the document whenever the venture, or a possible casualty are referred to.

There is also much that is familiar with present-day practice in its different clauses. The risk begins "the day and hour that the goods are loaded aboard the said vessel" and continues until she shall have arrived at port and "all goods there discharged on land in good safety."

In the event of loss or accident ("which God forbid") the assurers were to pay the amount of the insurance within three months from receiving news of the loss, and were then only free to institute proceedings if they disputed the claim. In that event they were given eighteen months to procure their proof; they were also given security for repayment of the amount in the event of the decision being reversed.

Chapter XLIII

FIRE INSURANCE

Keep in mind these questions when studying this chapter:

1. **What is an insurable interest in property?**
2. **Must all facts affecting the risk be disclosed?**
3. **How do warranties differ from representations?**
4. **May an insurance policy be assigned?**
5. **In what respect do valued policies differ from open policies?**

§ 256. **Fire insurance.**—This is an undertaking to indemnify the owner, or person having an insurable interest in the property insured, against loss or damage caused by fire. A fire insurance policy is a contract to indemnify the policyholder against an actual loss. It is not to be made a source of profit to the one insured. Since the purpose is to indemnify against an actual loss, it is foolish to insure the property for more than its real value. The loss or damage may include buildings, merchandise, and other property on land, exposed to injury by fire. It may also cover damage from water in "fighting a fire."

§ 257. **Insurable interest.**—Any person competent to make a contract, and having an insurable interest, may take out insurance on his property. The right to insure is limited to those who would be directly injured, that is, suffer a pecuniary loss by the destruction of the property. There may be as many separate and distinct insurance policies on the same property as there are separate insurable interests connected therewith. If the insured had no interest in the property, he could have no object in insuring it except as a mere speculation, which is contrary to law. If the interest is anything less than sole ownership, the policy usually requires that it be stated. The insurable interest must exist in the insured at the time of the loss, otherwise the policy is void.

Examples of an insurable interest.—Landlord and tenant, mortgagor and mortgagee each have an insurable interest. Likewise, persons in whose care property had been intrusted, as innkeepers, common carriers,

warehousemen, and bailees. A shareholder in a corporation has an interest in the property owned by the corporation; a partner has an interest in the property of the firm. An agent may insure property in his possession belonging to his principal, but for which the former is responsible.

(1) *Assignment.*—If one sells his interest in the property insured, he parts with his insurable interest. While one cannot recover for a loss occurring after he has sold the property, he may, with the consent of the insurer, assign to the purchaser his interest in the policy. This is a very common practice in the sale of real property. The consent of the company must always be obtained where there has been an assignment of a policy of insurance.

§ 258. **Kinds of policies.**—There are different kinds of policies. They differ according to the character of the contract. The most common form, as to the amount payable, are either:

(1) Valued policy.
(2) Open policy.

(1) *A valued policy* is one where the amount to be paid in the event of a loss is fixed and named in the policy.

(2) *An open policy* is one where the amount to be paid in case of a loss is left open, and is to be determined by the amount of the actual loss, not in excess of the amount stipulated in the policy.

Marine insurance is generally covered under valued policies; and life and accident insurance is practically always valued. The most common form of fire insurance is covered by open policies. In case of a loss under the latter form of a policy, the insurance company will pay that part of the maximum amount stated in the policy which will indemnify the insured. If a building insured for $5,000 is damaged $4,000, the entire amount of damages will be paid. If the damage should amount to $7,000, which is $2,000 more than it is insured for, only the maximum of the policy, $5,000, will be paid.

§ 259. **Effect of fraud.**—Fraudulent dealings are fatal to the rights of the party responsible for them in effecting insurance. Contracts of insurance require the utmost good faith between the parties to the agreement; their minds must meet without fraud. It is the duty of the party seeking insurance to reveal any circumstances, the concealment of which would be a violation of good faith. The effect of such concealment will render the contract voidable at the election of the injured

party. In this respect, insurance contracts stand upon a different basis from other contracts. In an ordinary contract, one is not obliged to disclose what he knows about the material facts. The rule of *caveat emptor* applies. In insurance it is different. It is, therefore, essential that an applicant for insurance give correct answers to all questions, supply information, and disclose all facts that might reasonably influence an insurance company in determining whether or not to issue a policy.

A merchant discharged a clerk who was unsatisfactory. The clerk threatened to burn the merchant's store. The latter, to protect himself against a possible loss, took out a fire insurance policy, but failed to inform the insurance company of the threatened danger. The discharged employee set fire to the building for revenge. The policy was held to be void. The merchant should have advised the company of any facts that materially affected the risk to be assumed.

§ 260. **Representations.**—Representations in relation to insurance are statements made as an inducement to enter into a contract. They are regarded as preliminaries leading up to the making of the agreement, but they are not in themselves a part of it. They are made by the insured with a view of giving information concerning the risk. If the representation is material and false, it will void the policy, although innocently made. A representation is material when it is of such a nature as to induce the insurer to take the risk, or to take it at a lower premium rate than he otherwise would.

Armour applied for additional insurance on a warehouse. In applying for the policy he mistakenly stated there was already $200,000 insurance on the building; there was, in fact, only $30,000. The insurance company's liability was thereby greatly increased, as their ratable portion would be less with the larger amount of previous insurance. The representations were material and the plaintiff was prevented from recovering, although he believed his statement was true at the time of making it. (90 N. Y. 450.)

Representations as to beliefs or expectations of a future fact amount only to statements of opinion; they are not material and the policy will not be void if the events turn out contrary to the expressed belief.

Plaintiff in applying for insurance on his house stated that it was vacant, but would soon be occupied, as he was arranging with a tenant who was to rent and occupy it. This statement was made in good faith, but the building was destroyed by fire before it was occupied. The plaintiff's statement being made in good faith, although he failed to fulfill it, entitled him to recover the insurance. (9 Allen 540.)

§ 261. **Warranties.**—The term warranty, in insurance, is a statement referred to, or inserted in and made a part of the policy. The validity of the contract will depend upon the truth made in the representations of warranty. A breach of warranty will render the policy void, at the election of the injured party, whether it is material or immaterial. If a warranty is false in any particular, whether important or unimportant, the insured cannot recover on an insurance contract. In this respect, a warranty differs very materially from a misrepresentation, for, as we have seen, the falsity of a representation will not invalidate the policy unless it relates to a material fact.

A warranty must be a part of the contract, but the word "warranty" need not be used if the statement or assertion means the same thing. Many of the states have in force statutes providing that a warranty, to avoid the policy, must be material. The courts also look with disfavor on warranties in insurance contracts, on account of the hardships caused by reason of their strict observance. When it is doubtful whether the statement is a representation or a warranty, the courts usually give it the former construction.

A policy of insurance was issued on a stock of goods "contained in the two-story frame house filled in with brick, situated at No. 152 Chatham Street." The house was, in fact, a wooden house with hollow walls not filled in with brick. The court held that the policy was void. "Filled in with brick" was a warranty that had not been complied with by the insured. (6 N. Y. 673.)

§ 262. **The risk.**—Losses by fire include not only damages done by the fire, but also such as a result from scorching, smoke, water used in extinguishing the fire, or the efforts of hasty removal of the goods insured to a place of safety. The insurer is liable for loss sustained in blowing up a building to arrest the progress of a fire. If there is no clause in the policy including loss by lightning, the insured will not be entitled to indemnity unless a fire resulted from the lightning. The fire must be "hostile," unusual and destructive, and out of its ordinary place. Damage done by a smoking lamp chimney, an overheated stove, or a pipe-hole that allows smoke to escape from the chimney, is not covered by an ordinary policy.

Insurance covers losses resulting from the carelessness or

negligence of the insured. This is true whether the loss is a result of the carelessness of the insured, or caused by the carelessness of others, or an inevitable accident. However, if the negligence were so gross as to show an evil intent or misconduct on the part of the insured, it would destroy his claim for damages.

The plaintiff set fire to a quantity of waste paper, which he had placed in a stove. The intense heat thus produced caused the soot in the chimney to catch fire, damaging the chimney and otherwise causing loss. This was a hostile fire, and was covered by the policy. (166 Mass. 67.)

The insured attempted to smoke wasps out of a barn (a dangerous undertaking in more respects than one), by thrusting a lighted wisp of hay into the dry timber of the barn, in close proximity to the hay. A fire resulted. While the court held that the negligence of the insured was of an extreme character, there was no evidence of bad faith, and he was permitted to recover the loss sustained by the fire. (4 Allen 388.)

The insured owned a wooden warehouse in that section of the city where there was a restriction against wooden warehouses. A fire destroyed the building. The insurance company sought to prove that the warehouse was worth only $900 although it was insured for a much larger sum. To replace the building as a warehouse on the same site would, owing to the municipal regulations, cost $5,000. The court held that the company would be required to pay the latter amount as the measure of loss the insured had suffered. (11 Mich. 425.)

§ 263. **Cancellation.**—A policy of fire insurance can be unmade by expiration, by cancellation, or by forfeiture. A fire insurance policy practically always expires at noon on a day named. It usually stipulates that standard time shall govern. If a fire breaks out just before noon on the day of expiration of the policy, the whole of the loss that results is covered thereunder even though most of the damages actually occurs after the hour of noon. The insurer may cancel the policy at any time by giving required notice to that effect, and returning unearned premium *prorated*. The insured may also cancel the policy, and premiums will be returned based upon short time rate. The policy will be forfeited by an open violation of its prohibitions.

QUESTIONS FOR DISCUSSION
(Oral)

1. McMasters contends that fire insurance is an "investment contract." Wyatt argues that it is an "indemnity contract." How do you vote on this question?

2. May you insure your neighbor's garage, and collect from the insurance company in case the building is destroyed?

3. Hess deeded his house to Sanders and took a mortgage for the unpaid balance. Hess held an insurance policy covering the house from January 1, 1926, to January 1, 1927. Sanders made his final payment on the mortgage August 15, 1926. The house was destroyed by fire November 1. Can Hess collect from the insurance company?

4. X contemplates the purchase of a barber shop. He has taken an option on the place, which runs for sixty days. The probability of purchasing the shop prompted him to buy fire insurance. Can he collect if the building is destroyed by fire, the ownership being still invested in the grantor?

5. Do you think it wise to give a thief the benefit of protection offered by a fire insurance policy on a stolen article?

6. Doe sold his house to Roe for cash and delivered to Roe the deed and an insurance policy. The policy expires July 1. The house was destroyed by fire on June 28. Can Roe collect from the insurance company? What will determine his rights in this question?

7. Valentine removed his furniture, locked up his house, and went to Honolulu for an indefinite stay. The house was insured and, during his absence, was destroyed by fire. The company will not pay if the house was vacant. Can Valentine collect for the loss? (35 Mich. 289.)

8. Willborg's building was insured against loss by fire but the policy excluded loss by explosion. A hostile fire caused an explosion in this building. Can Willborg collect? (2 Fed. 633.)

9. A, contrary to his wife's cautions and commands, habitually smoked his pipe while in bed. A spark from A's pipe caused his hurried removal and the destruction of his place of comfort. Can A collect from the insurance company?

10. Fire breaks out in a manufacturing district at 7 o'clock A. M.; it reaches Cline's building by 2 P. M.; the insurance on his building expired at noon. Is Cline entitled to indemnification from the insurance company?

CASE PROBLEMS
(Written or Oral)

No. 242

A building owned by Guise was struck by lightning and a large loss resulted. Guise's insurance policy made no mention of a loss due to lightning. Is the company liable?

No. 243

Baldwin had a fire insurance policy which contained a cancellation clause giving either party the right to cancel on five days' notice. The insurance company learning of forest fires which raged in that section, sent Baldwin a registered letter canceling the policy. In your judgment is this cancellation effective? (65 Ill. 11.)

No. 244

A letter was mailed by an insurance company canceling a policy. The insured failed to receive the letter. Must the company pay in case of loss? (127 N. Y. 608.)

No. 245

Manning's house is threatened with fire, but in applying for insurance, he conceals this fact. The house is destroyed by fire. Does the insurance company have a defense?

No. 246

Z carelessly set fire to some rubbish on his place which caused his house to be completely destroyed. Can he recover the insurance? (4 Mass. 388.)

No. 247

Wise insures his house for $2,000 in three different companies. The house is worth $3,000. If it is completely destroyed by fire, how much will each company be obliged to pay?

No. 248

Harding insured his house, worth $10,000, for $8,000. He had a partial loss estimated at $4,000. How much will he be entitled to recover? If the house had been completely destroyed, how much could he collect? (3 La. 366.)

Chapter XLIV

LIFE INSURANCE

Keep in mind these questions when studying this chapter:

1. **What are the outstanding types of life insurance policies?**
2. **Why must there be an insurable interest?**
3. **What is the effect of warranties, representations, and concealments?**
4. **What are the factors that determine premium rates?**

§ 264. **Definition.**—Life insurance, in its ordinary form, is an agreement on the part of the insurer to pay a specified sum to a second party, upon the death of the person whose life is insured, in consideration of stipulated payments (called premiums) made to the insurer. The one to whom the proceeds are payable is called the beneficiary. The insurance may be payable to the person whose life is insured, to his estate, or to a third person, unless otherwise prohibited by law.

§ 265. **Kinds of policies.**—The contract of life insurance may take various forms. It is said that more than four hundred kinds of policies have been devised to promote the business of insurance. Policies of life insurance most commonly in use are:

(1) Straight life insurance.
(2) Term insurance.
(3) Limited payment insurance.
(4) Endowment insurance.
(5) Annuity insurance.

(1) *Straight life.*—This kind of policy provides for a fixed premium to be paid each year during the life of the insured, and at his death a stipulated sum is to be paid to the beneficiary.

(2) *Term insurance.*—A policy in this class is taken for a stated number of years. The face of the policy is paid only in case of the death of the insured before the expiration of

the term. Such a policy is usually issued for a short time, and for temporary protection.

(3) *Limited payment.*—A limited payment life policy is one which provides for the payment of premiums for ten, fifteen, twenty years, or a longer term, after which all payments cease, the policy being paid up in full. At the death of the insured, the face amount of the policy will be paid to the designated beneficiary.

(4) *Endowment insurance.*—This is a contract payable to the insured if he is living at the end of a certain number of years, or to a designated beneficiary should he die sooner. Twenty-year endowment policies are the kind most commonly used, although longer or shorter terms may be selected. An endowment policy is presumed to offer an investment as well as protection.

(5) *Annuity insurance.*—An annuity policy provides for paying the insurer a fixed sum in return for which the insured is to receive a yearly income during his life or for a fixed period. Life insurance is protection in case of death; an annuity is protection in case of life.

§ 266. **Insurable interest.**—In order to effect a valid insurance contract, there must be an insurable interest in the life of the person insured. To have an insurable interest, there must be a legal right or a pecuniary advantage or gain from the continuous life of the insured. If one might insure the life of another where such an interest did not exist, the former would be more interested in the death of the insured than in his living. This would be considered a wager, and against public policy.

Every sane person has an insurable interest in his own life, and one may insure his own life in favor of whomever he may choose, whether there is an insurable interest in existence or not. But if the premiums are to be paid by the beneficiary, there must be an insurable interest present at the time of the taking out of the policy. However, it need not continue during the life of the insured. In this respect, the insurable interest in life insurance is different from that in fire insurance where the interest must exist at the time of

the loss, but not necessarily at the time of effecting the insurance. Fraternal insurance companies generally require that the policy must be issued in favor of certain immediate relatives or those directly dependent upon the member insured.

Husband and wife each have an insurable interest in the life of the other and in their minor children. A sister has an insurable interest in the life of her brother upon whom she is dependent for support, but not merely because of blood relationship. A creditor may insure the life of his debtor, but the policy must not be greatly in excess of the debt; if it is too large it will be void on the theory of its being a gambling scheme. A partner has a like interest in the life of his co-partner, and a surety in the life of his principal. A woman has an insurable interest in the life of the man to whom she is engaged to be married.

Harriet Chisholm and Robert Clark were engaged to marry. Harriet took out a life insurance policy on the life of her intended husband. Clark died before they were married, and the insurance company refused to pay the policy on the ground that there was no insurable interest. But the court said there was, and decided that Miss Chisholm could recover. It was held that if Mr. Clark had lived and failed to keep his agreement, she could have sued him for damages for breach of promise; and had they been married, she would have been entitled to support. (52 Mo. 213.)

Merely because persons may be closely related does not give one an insurable interest in the life of the other, as for example, one brother in the life of another, an uncle in the life of a nephew, a grandson in the life of his grandmother, or a son-in-law in the life of his mother-in-law. Most policies of life insurance contain a provision that the insured may change his beneficiary at any time.

§ 267. **Warranty, representation, and concealment.**—The principles concerning these topics have already been considered. In an application for life insurance, great care must be exercised in answering the questions. Accurate answers must be given to questions concerning the applicant's occupation, habits, health, and family history. Material variations from the truth will tend to render the policy void. Statements as to age are material, and the answers must be correct.

Beecham took out an insurance policy in favor of his wife. In his application he stated that he did not use alcoholic stimulants. His wife brought an action on the policy. The company defended on the grounds of the intentional concealment by the insured that he did drink occasionally. The company contended that, if he used alcoholic stimulants to any extent at the time the insurance was made, that it rendered his answer false and the policy void. The court ruled that the statement was not a warranty but a representation which was substantially true, and the beneficiary entitled to recover. The courts do not require that answers be literally true, but substantially correct. (145 Ill. 308.) 120 U. S. 183.)

§ 268. **Premium.**—The amount of the premium charged varies with the age of the insured and the character of the insurance policy. Premium rates are usually calculated on a basis of $1,000 of insurance and are based on the probable number of persons of any given age who will die each year. They are all mathematically alike. One kind of policy will call for a higher yearly payment, or one company's rate may be higher than another's, but in each instance they give proportionately so much more or less insurance.

By means of tables of vital statistics accumulated through years of experience, expert mathematicians have calculated how many persons are likely to live to a specified age. As a result of this study, insurance companies have incorporated the results of their computations into what are called mortality tables. The mortality table commonly in use in this country is known as the American Experience Table of Mortality. It begins with 100,000 persons at the age of ten and fixes the limit of life at 96 years, the attained age at which the last three of the original 100,000 will die. This table is prescribed by statute in most of the states as the basis upon which the reserves of life insurance companies are computed.

§ 269. **Suicide: Execution: Death in crime.**—Generally, the policy provides that the insurer is not liable if the insured commits suicide. If the policy contains no such stipulation, the company will be liable. Many of the states now provide by statute that a clause exempting the company from liability where the insured takes his own life is void unless the party insured contemplated taking his own life at the time of taking out the insurance.

The policy itself may provide that there shall be no re-

covery if the insured is executed as a felon, and in some jurisdictions there can be no recovery under such circumstances even though the policy may not so stipulate. Nor can there be a recovery where the death of the insured occurred while engaged in the violation of law. This is construed, in some jurisdictions, to mean both criminal and civil law. Others apply it only to criminal law. In this second instance, some states do not include misdemeanors. This provision is quite common in accident policies. In order that the rule be applied, the loss or death must occur as a direct result of a wrongful act. The mere intent to commit a wrong would not be sufficient to defeat recovery. If one should die of heart failure while on the way to rob a bank it would not void the policy.

The insured had paid premiums for several years when he was murdered by the beneficiary. The company was relieved from their liability to the designated beneficiary (70 N. E. 567).

American Experience Table of Mortality

Age	Number Living	Number Dying	Expectation of Life	Age	Number Living	Number Dying	Expectation of Life	Age	Number Living	Number Dying	Expectation of Life
10	100,000	749	48.72	39	78,862	756	28.90	68	43,133	2,243	9.47
11	99,251	746	48.08	40	78,106	765	28.18	69	40,890	2,321	8.97
12	98,505	743	47.45	41	77,341	774	27.45	70	38,569	2,391	8.48
13	97,762	740	46.80	42	76,567	785	26.72	71	36,178	2,448	8.00
14	97,022	737	46.16	43	75,782	797	26.00	72	33,730	2,487	7.55
15	96,285	735	45.50	44	74,985	812	25.27	73	31,243	2,505	7.11
16	95,550	732	44.85	45	74,173	828	24.54	74	28,738	2,501	6.68
17	94,818	729	44.19	46	73,345	848	23.81	75	26,237	2,476	6.27
18	94,089	727	43.53	47	72,497	870	23.08	76	23,761	2,431	5.88
19	93,362	725	42.87	48	71,627	896	22.36	77	21,330	2,369	5.49
20	92,637	723	42.20	49	70,731	927	21.63	78	18,961	2,291	5.11
21	91,914	722	41.53	50	69,804	962	20.91	79	16,670	2,196	4.74
22	91,192	721	40.85	51	68,842	1,001	20.20	80	14,474	2,091	4.39
23	90,471	720	40.17	52	67,841	1,044	19.49	81	12,383	1,964	4.05
24	89,751	719	39.49	53	66,797	1,091	18.79	82	10,419	1,816	3.71
25	89,032	718	38.81	54	65,706	1,143	18.09	83	8,603	1,648	3.39
26	88,314	718	38.12	55	64,563	1,199	17.40	84	6,955	1,470	3.08
27	87,596	718	37.43	56	63,364	1,260	16.72	85	5,485	1,292	2.77
28	86,878	718	36.73	57	62,104	1,325	16.05	86	4,193	1,114	2.47
29	86,160	719	36.03	58	60,779	1,394	15.39	87	3,079	933	2.18
30	85,441	720	35.33	59	59,385	1,468	14.74	88	2,146	744	1.91
31	84,721	721	34.63	60	57,917	1,546	14.10	89	1,402	555	1.66
32	84,000	723	33.92	61	56,371	1,628	13.47	90	847	385	1.42
33	83,277	726	33.21	62	54,743	1,713	12.86	91	462	246	1.19
34	82,551	729	32.50	63	53,030	1,800	12.26	92	216	137	.98
35	81,822	732	31.78	64	51,230	1,889	11.67	93	79	58	.80
36	81,090	737	31.07	65	49,341	1,980	11.10	94	21	18	.64
37	80,353	742	30.35	66	47,361	2,070	10.54	95	3	3	.50
38	79,611	749	29.62	67	45,291	2,158	10.00				

SPECIMEN POLICY.

No. 000,000 Organized 1845

The Mutual Benefit Life Insurance Company

Of Newark, New Jersey.

Insured. In consideration of the payment of Premiums as hereinafter provided, hereby insures the Life of John Jones of Newark in the County of Essex State of New Jersey (herein called the Insured)

Amount in the sum of Ten thousand Dollars,

When, Where and to Whom Payable. for the term of Life, payable at its office in Newark, New Jersey, to ——————

the executors, administrators or assigns of the Insured, immediately upon receipt of due proof of the death of the Insured. Any error made in stating the age of the Insured will be adjusted by paying such amount as the Premiums paid would purchase at the correct age. Any indebtedness to the Company on this Policy and any unpaid instalments of the then current year's Premium will be deducted from the sum insured.

Premiums. The Annual Premium of Three hundred and sixty-two Dollars and twenty Cents, will be payable by the Insured on delivery hereof and on the first day of January in each year at the Company's office in Newark, New Jersey, or to Agents in exchange for receipts signed by the President or Treasurer, until Twenty full years' Premiums shall have been paid, or until the death of the Insured, should that event sooner occur. In lieu of the Annual Premium the Company will accept One hundred and eighty-four Dollars and seventy Cents Semi-annually in advance, or Ninety-four Dollars and twenty Cents Quarter-annually in advance. This Policy will not take effect unless the first Premium or agreed instalment thereof shall be actually paid during the lifetime of the Insured.

Assignment. No Assignment of this Policy shall affect the Company until it shall have received written notice thereof.

Agents. Agents are not authorized to make, alter or discharge contracts

Incontestability. If within one year the Insured shall commit suicide, while sane or insane, this Policy will be null and void. This Policy will be incontestable after one year from its date of issue except for non-payment of Premium.

The Provisions and Agreements printed on the second and third pages hereof are a part of this contract.

IN WITNESS WHEREOF, The Mutual Benefit Life Insurance Company has, by its President and Secretary, signed this contract at the City of Newark, in the State of New Jersey, this first day of January one thousand nine hundred and ten

Examined

Age 35

J. William Johnson
Secretary.

Fred'k Frelinghuysen
President.

Attest:
Lewis A. Mornington
Registrar.

Whole Life Policy. Premiums Payable for 20 Years.
Dividends Annually beginning with 2d policy year as provided herein.
Form 4.—Sett.

(No 857)

QUESTIONS FOR DISCUSSION
(Oral)

1. The manager of an artist who is under contract to sing for him, has taken out an insurance policy on the life of the artist. Who would be entitled to the money in case of the artist's death?

2. Jones, a bachelor, took out a policy, payable to Miss Pedagog, a teacher, who was not related nor indebted to Jones, the beneficiary. Can Miss Pedagog collect?

3. Gantry owes Bell $1,200. It is due on the first of January. Bell insures the life of Gantry for $1,000. The debt was paid in July. Gantry died in August. Can Bell enforce payment of the policy?

4. A robber, while attempting to hold up a mail train, died of apoplexy when he discovered he had stopped a freight train. Could the beneficiary collect in jurisdictions where a violation of law will excuse payment?

5. A dentist applied to a life insurance company for a policy. In the application blank, which was made a part of the policy, he stated in answer to a question that he was a physician. Should this affect the policy?

6. Question number 28 in the application for life insurance is as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in the company, state the number of the policy."

The following answer was given to these four questions: "10,000. Equitable Life Insurance."

A policy was issued upon this application. Is the company liable on this policy? (120 U. S. 183.)

7. C, the insured, in conversation with the agent prior to obtaining his policy, said that he never had pneumonia, or any other lung trouble. He, in fact had had pneumonia and much lung trouble. Not long after obtaining the policy he died of consumption. Must the company pay?

CASE PROBLEMS
(Written or Oral)

No. 249

Mr. Robert Lane was killed in an automobile accident. Soon after his death, three suits were filed against three insurance companies by three policyholders upon the life of Lane. The first policy was held by Mr. Curtis for $10,000. At the time the policy was issued Lane owed Curtis $4,000 and at the time of Lane's death none of it had been paid. Another policy was in favor of Hannah Doe, who was engaged to Lane at the time of his death. The third policy was held by Lane's sister, who had always lived with her brother, and was entirely dependent upon him for support. Which, if any of these suits will prove successful, and why? (52 Mo. 213.)

No. 250

Gilman, by means of false entries in the books of the firm of which he was a partner, had wrongfully taken $220,000. After Gilman's death there were found in the office safe insurance policies aggregating $45,000 payable to his wife. All premiums were paid with firm funds. Suit is brought by one of the partners against Mrs. Gilman for the amount of the policies. Result?

No. 251

The insured started out with the intent to hunt prairie chickens during the closed season, but was killed before he had actually done any hunting. Does such a "violation of law" defeat recovery? (6 N. D. 191.)

No. 252

A. M. Smith was indebted to Rittler in the sum of $1,000. Rittler took out insurance on Smith's life in four different companies. Smith died and Rittler collected from the companies $2,124.82. Deducting from this sum the debt, the interest due, and the premiums paid, there remains a balance of $474.58. Smith's widow, the administrator, and Rittler want this money. Who is entitled to it? (90 Cal. 245.)

Chapter XLV

REAL PROPERTY

Keep in mind these questions when studying this chapter:

1. **In general, what is real property?**
2. **What is usually classified as real property?**
3. **Why is it important to distinguish between real and personal property?**
4. **What is the technical meaning of lands, tenements, and hereditaments?**

§ 270. **Meaning of the term property.**—Property includes whatever the law permits a man to possess, to enjoy, and to dispose of, to the exclusion of others. While nearly everything in the material world may be owned by individuals, the air, the seas, and running water, are some of the things excluded from private ownership, although one may have the right to enjoy them temporarily.

§ 271. **Wild animals.**—Wild animals not in captivity are not considered property. They are not subject to the exclusive dominion of an individual but belong to the State for the benefit of the public. No person has an exclusive right in them until he has obtained possession by killing or capturing them. The owner of the land on which wild game happens to be has no property right in the game thereon, but he does have a right to keep the public from entering his land to hunt.

In the case of navigable rivers, there is no exclusive right of fishery in the adjoining landowners, that right is in the public. Where the public has such a right, no one can lawfully go upon the land of another for the purpose of catching fish, without consent.

§ 272. **Classification.**—All property susceptible of ownership is divided into two general classes:

(1) Real property or realty.
(2) Personal property or personalty.

These distinctions are arbitrary and technical, but important, due to the difference in the laws by which the two different classes of property are protected, transferred, and regulated, by contract. The words movable and immovable are also used to indicate the essential differences between these classes of property.

The names "real property" and "personal property" were not originally selected as descriptive terms of the things included in each class, but are derived from Latin names, *actio realis* and *actio personalis*, applied in early times to the different kind of actions resorted to, in a court proceeding, by one who had been deprived of his property. If one could recover the real thing sued for—the land itself—he used what was termed a "real action," and as the real action was brought for property in land only, real property became the name of property interests in land, except leaseholds and liens. When the action would result in the recovery of the money value of the thing sued for—and not in the specific property, as cattle or goods—the action was in effect against the person, and was known as a "personal action," and the name personal property was used to designate the kind of property concerning which the action was brought.

§ 273. **Descent.**—Real property descends at once to the heirs of the owner, upon his death, unless disposed of otherwise by will. The owner's heirs are those who inherit his real property, the most common case being the children. The title to personal property does not pass from the deceased to his heirs but to his "personal representative." (Executors and administrators are known as personal representatives of the deceased.) The executor or administrator has the legal control of the estate for the purpose of administering it. After the debts of the estate are paid, the remainder of the property, if any, is distributed according to the terms of the will, if there be a will, otherwise, according to the provisions of the statutes where the estate is administered.

§ 274. **Things considered as real property.**—Real property is said to consist of *lands, tenements,* and *hereditaments.* The term hereditament includes everything that can be inherited; that is, everything that would go to the heir upon the death of an ancestor. Heirlooms were considered hereditaments under the English law, but they are not so considered in the United States. The technical meaning of tenements does not relate to a building rented to tenants, but pertains to all immovables which are capable of being held by tenure, that is,

at the will of someone else. These terms are introduced here to illustrate some of the technical words used in real property law.

Some of the more familiar things that are treated as real property are:

(1) Land.
(2) Crops.
(3) Trees.
(4) Water rights.

(1) *Land.*—Land includes whatever is above or beneath the surface of the earth, or as the old phrase ran, "whoever owns the surface owns everything up to the sky and everything down to the center of the earth." It embraces the soil and everything upon it, and everything attached to it, whether naturally, as trees, grass, and water; or artificially, as buildings, fences, and other permanent structures. It also includes mines, quarries, mineral lodes, oils, and gases; and a conveyance of land carries with it all these things.

Plaintiff was the owner of a farm in Iowa. On this land there fell from the heavens an aerolite which was found by Hogland, embedded in the earth. Hogland dug it up and removed it to his own property. Later he sold it to the defendant. Plaintiff claimed title under the rule "that whatever is affixed to the soil belongs to the soil." Defendant contended his grantor, Hogland, obtained ownership as finder of abandoned or lost property. The court ruled that the aerolite became the property of the owner of the soil, and that the rule as to lost property was not applicable—the property was not lost nor abandoned. It was in the soil and a part of it. (86 Iowa 71.)

(2) *Crops.*—Crops, such as grain and vegetables that require annual care and attention, are regarded as personal property. But a conveyance of land without a reservation of the growing crops, planted by the owner, passes title to the crops. If the crops have been severed from the land, but have not been removed, they will not go to the purchaser of the land.

Trees planted by a nurseryman, upon land leased for the purpose of growing them for the market, are regarded, as between the landlord and tenant and for the purpose of sale, as personal property.

A rosebush in the yard will pass by the deed of the realty. Trees fallen to the earth or cut down and lying on the land are still a part of it; but if hewn or cut for sale, or fuel, they are not so considered. Fences go with the real estate, but rails piled up are personal property.

(3) *Trees.*—The owner of the land owns the trees upon it. If the branches of a tree extend over the line of an adjoining proprietor, the latter may cut off boughs or twigs; he may even dig into the earth and remove roots that come into his land. When these projecting roots and branches have been removed they, and the fruit from them, belong to the one upon whose land the trunk of the tree stands. The tree, together with its product, is the sole property of him on whose land the trunk of the tree is situated, and as such he is entitled to its product; he may enter upon the land where it lies to gather it and carry it away. The location of the trunk as it appears above the surface of the earth determines the ownership of the entire tree. When a tree stands on the boundary line it is the joint property of both, and neither can remove or injure it without the consent of the other.

Plaintiff A and defendant X were adjoining owners. Defendant picked and carried away the fruit on the branches of the trees growing on his neighbor's land but overhanging his property. The defendant contended that he was the owner of everything above his land. The court held that he was the owner of the space above his land, and might trim and remove the branches of the trees but that the fruit growing on the trees belonged to the owner of the trees. It was this soil that furnished the nourishment. (38 Vt. 115; 48 N. Y. 201.)

(4) *Water rights.*—The owner of land adjoining a stream, not navigable, is the owner of the soil to the middle of the river. Where the river is described as a boundary, the law will construe the grant as extending to the middle of the river. The proprietor whose title extends to the middle of the stream has no title to the water. He has a right to make a reasonable use of it for his land, stock, or house, while passing over his land; but he must not, in any substantial way, diminish or impair the right of use by a lower or another proprietor. He may change its course on his own property, but he must not divert it so as to cause it to enter into his neighbor's land elsewhere than its natural channel. When the water is congealed into ice and is attached to the soil, it is considered a part of the real estate, and the owner of the land has a right to prevent its removal by another.

Courts will enjoin the continued wrongful diversion of a watercourse, though the complainant has suffered no material damage thereby, as otherwise the diversion might ripen into a prescriptive right. (232 Pa. St. 639.)

QUESTIONS FOR DISCUSSION
(Oral)

1. State what is meant by the following expressions:
   (a) "My property at 4913 East 24th Street needs repairs."
   (b) "This airplane is my property."
   (c) "All my property consists of a few notes and bonds."
   (d) "The automobile is in his possession, but the property is mine."

2. Lessing owned an eighty-acre farm, and had a bank account. He died intestate. The deceased paid his funeral expenses in advance. He had no debts. How will the property be distributed?

3. Williams is the proprietor of a farm. Adjoining this farm he owns a strip of land which has been used by the public as a roadway. Who is entitled to the grass, wood, and fruit that may be growing on this strip of land?

4. Joe Smith owns a square lot. Smith's ownership extends into the air as far as he can reasonably make use of the space. Following his ownership down into the ground, does his land take the form of a pyramid or a cube?

5. An aviator pilots his machine over your house and lot. He is eight hundred feet from the surface of the earth at the time of crossing. Is this a trespass?

6. Mrs. Doe sold all of her real property. Does this include the potted plants in and about the house?

7. Jennings sold his farm in May to Smart. Nothing was said about the corn and wheat which were growing on the land. Who gets the corn and wheat when ready to harvest?

8. Tyner owns a large cotton plantation. Just before the crop is ready to pick, Tyner dies intestate. Does the crop go to the heirs or to the administrator?

CASE PROBLEMS
(Written or Oral)

No. 253

A—— and B—— were the owners of adjoining land separated by a fence. A fruit tree on the land of A—— had overhanging branches. B—— was plucking some of the fruit from the branches hanging on his side of the fence. A—— ordered B—— to desist. B—— refused and a fight resulted. B—— claimed that the ownership of land included everything above the surface, and that he had a right to the fruit on his side of the fence. What are B——'s rights? (48 N. Y. 201.)

No. 254

Adams owns 160 acres of land. The land is fenced; on part of it there are growing trees and part is planted in corn and wheat. He has a house, barn, animals and machinery. In the milk house there is a cream separator firmly attached to the floor. In the house there is a hot-air furnace. Under the ground is a coal mine. Adams constructs a shaft for the purpose of mining coal. Make a list of the items classified as real property, and personal property, on this farm.

No. 255

A telephone wire was stretched across Anderson's premises about thirty feet above the ground. These wires were not supported by any structure standing on Anderson's premises. Will a suit in ejectment lie? (186 N. Y. 486.)

No. 256

Brown sold his farm to Jones. In the absence of any statement to the contrary, does Jones have title to trees which have been cut and are lying upon the land? (54 Maine 313.)

No. 257

A natural non-navigable stream passes through the farm belonging to Wm. Jones. Has Jones title to the water, to the soil under the water, to the ice? (33 Ind. 402.)

Chapter XLVI

ESTATES IN LAND

Keep in mind these questions when studying this chapter:

1. **How are estates classified?**
2. **What is the meaning of an estate in fee simple?**
3. **What is the right of dower? Of curtesy?**
4. **How is the right of eminent domain exercised?**

§ 275. **Estates classified.**—Frequently the term estate is used to denote the whole of a man's proprietary rights or belongings. It signifies everything of which riches or fortune may consist, and includes personal and real property. But the strict technical meaning is the interest which a person has in land.

Different persons may have different interests in the same tract of land. One person may be entitled to the immediate use and enjoyment of it, while another may own the postponed right of possession and enjoyment, which is not to begin until the termination of the first holder's right. These various estates are designated by different names dependent upon the nature of the interest held.

Estates are divided into two general classes:

(1) Estates of freehold.
(2) Estates less than freehold.

(1) *A freehold estate* is one of ancient origin and formerly applied to the possession of the soil by a freeman; a freeman was permitted to go where he pleased. The early meaning of the word has lost its significance and it is not part of our law, as all men are considered free. The most common illustration of a freehold is an estate in *fee simple.*

(2) *Estates less than freehold* are estates for years, estates at will, estates from year to year, and the like. An example of an estate for years would be a lease for ninety-nine years.

§ 276. **Fee simple.**—An estate in fee simple is the highest form known to the law. For all practical purposes, it is an absolute ownership in land without condition or qualification. The owner may sell the property to anyone he pleases, or give it away; he may make any use of it he chooses, provided it is not in violation of law nor does not interfere with the legal rights of adjoining owners. In the event of the owner's death, the land will descend to his heirs unless otherwise disposed of by will. Lands held in fee simple are subject to the debts of the owner after death as well as during life. Among the incidents of a fee simple are:

(1) The right of curtesy.
(2) The right of dower.
(3) The right of eminent domain.
(4) The right of alienation and devise.

§ 277. **Curtesy.**—An estate by curtesy is the interest which a husband has, during the remainder of his life and upon the death of the wife, in the lands of which the wife was seized in fee simple at any time during their marriage. Three conditions are necessary to create this estate: (1) There must have been a lawful marriage. (2) There must have been seizen (ownership) of the land in the wife. (3) There must have been a child born alive and capable of inheriting the property, although the child may have died immediately after its birth.

The husband may release his right of curtesy by joining in the deed with his wife conveying the title of the land to someone else. Curtesy exists in many of the states; in others it is abolished or greatly modified by statutes.

§ 278. **Dower.**—The provision of the law which gives the use of the land of the husband to the widow during her life, is termed *dower*. (There is no dower in personal property.) Under the common law, the widow is entitled to one-third interest in all the real property of which the husband was seized during their marriage. Dower is sometimes called the "widow's third." To entitle the wife to dower, the marriage must have been a legal one.

The husband cannot deprive his wife of her right of dower

by a transfer of title to the property. The only way the wife can be dispossessed of her right is by joining with her husband in a deed making a conveyance of the property. If she does not thus release her right, she can claim dower if she survives her husband.

As in curtesy, many of the states have abolished or changed the common law right of dower, and have provided the widow with other property rights in the estate of her husband at his death, which she may own and dispose of as she pleases.

§ 279. **Right of eminent domain.**—All real estate, in this country, is held subject to the *right of eminent domain.* This is the right or power of the state to appropriate private property to particular uses for the purpose of promoting the general welfare. By this means, the property of an individual is taken without his consent, and it may be in spite of his opposition, for the purpose of being devoted to the particular use of the state itself, or some person or corporation by authority of the state. The property is not confiscated. The owner is entitled to receive just compensation. If the amount cannot be determined by agreement, a trial is held and a jury will make the award after evidence has been submitted as to the value of the property sought to be taken.

The use for which the property is taken must be a public use, which means the public is to receive the benefit therefrom. Instances of such uses are: lands for streets and highways; public parks and buildings; irrigation ditches; railroad rights of way, terminal and switching facilities; and telephone and telegraph wires. The right does not exist for improving private estates, or building private roadways. It must be a public necessity.

The state of Vermont granted the West River Bridge Company the exclusive right to erect and maintain a bridge over a river. At a subsequent session of the legislature, an act was passed which provided for condemning property for highways. Under this statute the authorities took the bridge belonging to the West River Bridge Company after assessing compensation, and made it a free public highway.

The company contended that this proceeding impaired the obligation of a contract (see § 43) and endeavored to have the entire matter set aside. The court held that a charter was a contract but it was subject to the right of eminent domain in the state, and the company had no legal complaint. (6 Howard 507.)

QUESTIONS FOR DISCUSSION
(Oral)

1. Adams is the owner of an estate in fee simple. He has leased the land to Brown for three years. When are Adams' rights with regard to this property fully restored?

2. Suppose Adams sold this property after the lease had run one year, what are the buyer's rights? Can he remove the tenant?

3. Clark, the owner of an estate in fee simple, leased his farm to defendant for five years. At the same time Clark gave Morgan an estate for Morgan's life. Name the interests represented.

4. (a) What would be the result in the above case if Morgan should die before Clark?
   (b) What is the result if Clark should die first?

5. A, who no longer lived with his first wife, unlawfully married B, the owner of valuable real estate. Does A have a right of curtesy in B's land at common law?

6. Mrs. Smith was preceded in death by her son who was a day old when he died. She owned a farm and left a bank account. Under the common law, how does the surviving husband share in this property in the absence of a will?

7. Suppose Mrs. Smith had sold her farm before her death to J. J. Jones. Would this have defeated Mr. Smith's curtesy?

8. When John Doe married Alice Doolittle he owned an eighty-acre farm. Three days after their marriage, Doe signed a deed conveying this property to his mother for $15,000. Mrs. Doe did not sign the deed. Several years later, and after Mr. Doe's death, his widow seeks to recover $5,000 from her former husband's mother. Will she be successful?

9. The state in which you live is desirous of erecting a state house (capitol) on the square in which you reside. May the state take away your property for this purpose without your consent? For what other purposes may you be deprived of your property without your consent?

10. An interurban line, according to a proposed survey, will cut off a corner of a valuable subdivision owned by Smith. It will destroy the value of much of his property. Is Smith under obligation to sell?

Chapter XLVII

CONVEYANCE OF REAL PROPERTY

Keep in mind these questions when studying this chapter:

1. **How is title to real property acquired?**
2. **What are the incidents essential to a transfer of real property?**
3. **What is the value of an abstract of title?**
4. **In effect, what is the difference between a warranty and a quitclaim deed?**
5. **Why should a deed be recorded?**

§ 280. **Alienation.**—Title to real property is not transferred with the same ease and convenience as in the case of personal property. The law requires certain formalities in dealing with real property which are unnecessary in transferring the ownership of personal property. The transfer or conveyance of the title to real property from one person to another, with his consent is, in law, termed alienation. Alienation may be by deed or it may be by *devise,* the word used when it is transferred by a last will and testament.

§ 281. **Titles to land.**—Originally, all private titles to land in this country were derived (a) from grants to the states; (b) from the federal government; or (c) from royal grants prior to the revolution. For instance, in Texas, titles are derived from the state, because the state owned the land at the time it was annexed to the United States. In Missouri, titles are derived from the federal government; and in some of the far eastern states from royal grants made before the revolution. A government derives its title by discovery, by conquest, and by purchase.

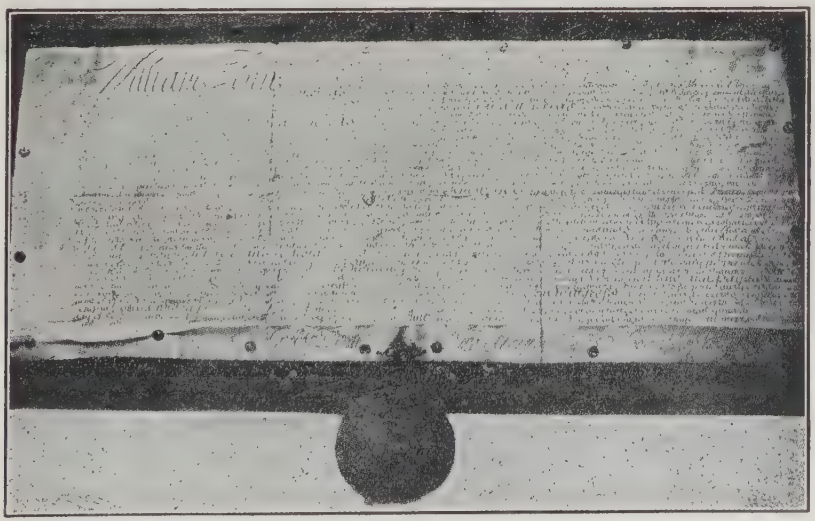
§ 282. **Deeds.**—When a purchaser acquires real estate, he receives from the seller a deed. A deed is a written instrument containing a contract, sealed, delivered, and accepted. By common use, the word is now employed to mean a written instrument by which title to land, or an interest in property, has been conveyed from the seller to the purchaser. As a general rule, land can be transferred before death by a deed

only. Such a deed should be (a) signed, (b) sealed, (c) acknowledged, (d) delivered, and (e) recorded. As before stated, private seals have been abolished in many of the states.

§ 283. **Agreement to purchase.**—After making a preliminary bargain to purchase land, there is frequently a delay preparatory to the execution and delivery of the deed. To enforce this agreement, the bargain must be in writing to comply with the requirements of the Statute of Frauds.

(1) *Land contract.*—The written instrument agreeing to buy or to sell land is usually in the form of a land contract, which provides for the conveyance of the land at some future time. The contract does not pass title, a deed is necessary to do that. Usually, printed forms of contracts are provided which comply with the legal requirements of the statutes of the particular state where the land is located.

A telegram, a letter, or series of letters by which the terms of the agreement can be ascertained, will satisfy the law. The contract need not be acknowledged to be binding, but unless acknowledged it cannot be recorded.



Courtesy J. V. Kendall.

DEED BY WILLIAM PENN

Photographic reproduction of a deed made by William Penn to 1,250 acres of land in Pennsylvania. The seal is of pure beeswax.

Land Contract

This Contract Witnesseth, That Peter Sterling of the county of Buena Vista, state of Iowa, has bargained and sold to Richard Roe of the county of Buena Vista, state of Iowa, for eight thousand ($8000) no/100 dollars the following described real estate in the county of Buena Vista, state of Iowa, to wit: The south-east quarter (S. E. 1/4) of section thirty-one (31), Township thirty-five (35) and range thirteen (13).

Of the purchase price one hundred ($100) no/100 dollars has been paid and is deposited with John Doe, agent for the seller, and the balance payable as follows: Three thousand nine hundred ($3900) no/100 dollars on the first day of May, 1929, and four thousand ($4000) no/100 dollars on the first day of May, 1930.

The seller agrees to furnish, within ten (10) days from date hereof, at the office of his agent making this sale, a complete abstract of title to the property, certified by competent abstractors from the U. S. Government to this date, including certificates in full, as to taxes, judgments or other liens.

The buyer to have twenty (20) days for the examination of the abstract and report to the seller any defects in the title. If the title is found to be defective, the seller agrees to have the same rectified within a reasonable time which is not to exceed thirty (30) days from the date of written notice of such defects; but in case such defects in the title be not remedied within that period, and no extension of time is had between the parties hereto, this contract shall be null and void, and the money deposited aforesaid shall be returned to the buyer, and the abstract to the seller.

If, after such correction (if any required) as seller shall be able to make, it is found that the seller has a good title in fee to the property he agrees upon the receipt of the remainder of the full consideration as hereinbefore set forth to deliver to the buyer, or order, a good and sufficient Deed thereto, duly executed, conveying good title to the property, free and clear of all taxes and encumbrances whatsoever now thereupon, except state and county taxes for the year 1928 and thereafter.

If upon such delivery of deed or tender thereof, the buyer fails to comply herewith on his part by paying or delivering as hereinbefore stipulated, the remainder of the purchase price or consideration, the money deposited as aforesaid shall be forfeited by the buyer; and upon such forfeiture, this contract may or may not be thereafter operative at the option of the seller.

Unless otherwise stated herein, the income from the property is to go to the buyer pro rata for every day after May first, 1928, and mortgage notes given in part consideration shall bear interest after May first, 1928.

Time is of the essence of this contract.

In Witness Whereof. The said parties have hereunto set their hands this eighth day of March, 1928.

Executed in duplicate.

Peter Sterling
Richard Roe

§ 284. **Abstracts of title.**—Before a deed is accepted from the seller, the purchaser should be satisfied that the title to the property is good and free from all encumbrances. To this end he should require the seller to furnish an *abstract of title* —that is a history of the title. An abstract of title is a condensed memorandum taken from the records, consisting of a synopsis or summary of all the conveyances which, in any manner, may affect the land or the title to it. The title should then be examined by some competent attorney familiar with the laws of the state in which the lands are situated. The laws of the state in which the land is located govern its conveyance. From the facts given in the abstract, the attorney gives his opinion as to whether or not the title to the property to be conveyed is good or not. This precaution often prevents expensive lawsuits.

§ 285. **Principal kinds of deeds.**—There are various kinds of deeds; they are not all alike. The purchaser should be sure that he is getting a good deed and the right kind before he accepts it. The two principal kinds are:

(1) Quitclaim deeds.
(2) Warranty deeds.

(1) *A quitclaim deed* simply conveys any interest which the grantor may have in the property and nothing more. The grantee takes all the risk as to whether there is a good title to the property, or any title at all, but whatever there is, he gets.

(2) *A warranty deed* not only conveys to the grantee all the right and title of the grantor, but it contains in addition what are called covenants of warranty. It usually states that the grantor is lawfully seized (possessed) and has a right to convey; that there are no encumbrances; and that the grantee shall have quiet enjoyment and peaceable possession, and the grantor will warrant against all lawful claims. These promises are implied in some states by the phrase grant, bargain, and sell, or similar words.

§ 286. **Parts of a deed.**—A deed is a contract, hence, the essentials of a deed are the same as the essentials of any

other contract. Unless the statutes provide otherwise a deed should, among other things, contain:

(1) The names of the parties.
(2) The words of conveyance.
(3) Description of the property.

(1) *The names of the parties.*—The party making the conveyance is called the *grantor.* (If the conveyance is a mortgage, the *mortgagor.*) The party receiving the deed is known as the *grantee.* (In a mortgage, the *mortgagee.*)

(2) *The words of conveyance.*—The language varies in different kinds of deeds. The usual words are grant, bargain, and sell; or they may be grant, bargain, sell and convey. These words take the place of the ordinary covenants of warranty.

(3) *Description of the property.*—It may be by lots and blocks, or by metes and bounds. But it is important that it clearly and accurately describes the premises intended to be conveyed. Serious consequences are likely to arise, if the description is incorrect.

(4) *Formal acknowledgment* before an officer of the execution of the instrument.

§ 287. **Signature.**—After the deed is properly drawn, it should be signed by the grantor writing his name in the usual way at the place provided for the signature. If the grantor is a married man, the wife's signature should be written below that of the husband. In some states, the signature must be attested by a subscribing witness or by witnesses. In case the grantor should be unable to write his name, he may execute the deed by making a mark or cross, as follows:

John Brown
Witness to the
mark of Richard Roe

Richard { His / X / Mark } Roe

§ 288. **Acknowledgment.**—In most jurisdictions, the law requires a formal acknowledgment of the deed before a notary public, or some other public official authorized to take such

acknowledgments. This is done by the grantor appearing before the officer and presenting the deed for the proposed attestation. The one taking the acknowledgment writes a certificate to that effect on the deed at the place provided and affixes his official signature and seal. As between the grantor and the grantee, a deed is generally valid if not acknowledged, but to permit it to be recorded, it must be acknowledged. The acknowledgment should be in the form provided by the statutes of the state where the land is situated.

An acknowledgment of a deed or other legal instrument is the act of one who has executed it, in going before some competent officer or court, and declaring it to be his act or deed. The acknowledgment is certified by the officer or court. The term "acknowledgment" is sometimes used to designate the certificate.

All conveyances of real estate should be properly acknowledged, according to law in force at the time of the acknowledgment, in order that the title may be perfect in the strict sense of the word. It has been held that a deed made by a married woman, and acknowledged before an officer who had no authority to take acknowledgments, was not sufficient to pass her title. (63 S. W. 698.)

§ 289. **Delivery.**—A deed must be delivered to the grantee to be effective. No particular form of delivery is necessary. The grantor must, by acts or words, relinquish his control of the deed and the grantee must accept it. This may be done by the grantor's intention to deliver the deed, by his handing it direct to the grantee or through an agent, or he can direct the grantee to take the deed by picking it up from the table.

Sometimes deeds are placed in the hands of disinterested third persons to be delivered to the grantee on the performance of some act or the fulfillment of some condition. A deed thus delivered is said to be in *escrow*. It has no effect until the performance of the prescribed condition. After a deed is once delivered, the title immediately vests in the grantee.

A father made a deed conveying certain property to his daughter. He placed the deed in an envelope with her name written on the outside, and filed it in a safety deposit vault where it was found after his death, with this notation, "Record your deed when you open this envelope." The courts held that the deed, never having been delivered to the grantee —the daughter—the conveyance was invalid. (177 Ill. 409.)

§ 290. **Recording.**—As soon as the deed is delivered it should be recorded in the public register of the county in which the land is situated. The recording of a deed is public notice of the conveyance, and was adopted for the purpose of giving information to whomever it might concern. If the grantee neglects to record the deed, and the grantor should be dishonest, he might deed the same property to someone else, and if the second grantee records his deed first, the first grantee would be defrauded of his title. Then again, if the grantee fails to record the deed, and if creditors bring suit against the grantor, the purchaser may be caused a great deal of trouble and worry. If the original deed should be lost, a certified copy of the record can be obtained.

The statutes of each state prescribe the necessary formalities to entitle an instrument to be recorded, and what shall be the effect of the record as to notice and evidence. These laws are not uniform in the different states.

Every properly executed and acknowledged instrument is considered recorded as soon as it is in the hands of the recording officer. He notes upon it the day, the hour, and the minute when it was received by him.

§ 291. **Title guarantee companies.**—In the larger cities there are guaranty or trust companies whose business is insuring titles to real property. These companies issue policies and by the terms of their contract they engage to become responsible for the title and to defend any litigation that may be instituted against it. They are additional safeguards to the owner.

§ 292. **The Torrens System.**—The purpose of what is known as the Torrens system of registration and transfer of title to real estate is to free land title of the expense of conveyance, the perils that attend real estate transactions, and the expense of investigating chains of title back through former owners. This system provides for an examination of the title by certain officials. Their decision is official. When the property is transferred, certain formalities are required for the issuing of a new certificate. In the United States it was first adopted in Illinois, and, in varying form, is now used in several of the states.

Common Form of a Warranty Deed

Know all men by these presents:

That Peter Sterling and Louise Sterling, his wife

in consideration of Two Thousand (2,000) Dollars

to them *paid by* Thomas Timmons

the receipt whereof is hereby acknowledged, do hereby **Grant, Bargain, Sell and Convey** *to the said* Thomas Timmons

his *heirs,* ~~successors~~ *and assigns forever,*

Lot thirty-two (32) block six (6) in Oxford Park, an addition in the city of Dayton, County of Montgomery and State of Ohio, as per recorded plat thereof.

and all the **Estate, Title and Interest** *of the said* Grantors *either in Law or Equity, of, in and to the said premises;* **Together** *with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof;* **To have and to hold** *the same to the only proper use of the said* Grantee

his *heirs,* ~~successors~~ *and assigns forever.*

And the said Peter Sterling and Louise Sterling

for themselves *and* their *heirs, executors and administrators,* ~~successors~~ *do hereby* **Covenant** *with the said* Thomas Timmons

his *heirs,* ~~successors~~ *and assigns, that* they are *the true and lawful owners of the said premises, and have full power to convey the same; and that the title so conveyed is* **Clear, Free and Unincumbered; And further,** *That* they *do* **Warrant and Will Defend** *the same against all claim or claims, of all persons whomsoever;*

In Witness Whereof, *The said* Peter Sterling and Louise Sterling *who hereby release all* their *right and expectancy of* **Dower** *in the said premises, have hereunto set* their *hands this* twenty-second *day of* August *in the year of our Lord one thousand nine hundred* **and twenty-eight.**

Signed and acknowledged in presence of—

E. J. Knebel

W. O. Crosswhite

Peter Sterling

Louise Sterling

State of Ohio, County of Montgomery, ss.

Be it Remembered, That on this twenty-second *day of* August, *in the year of our Lord one thousand nine hundred* and twenty-eight., *before me, the subscriber, a* Notary Public *in and for said county, personally came*

Peter Sterling and Louise Sterling

the grantors in the foregoing Deed, and acknowledged the signing thereof to be their *voluntary act and deed*

In Testimony Whereof, *I have hereunto subscribed my name and affixed my* official *seal on the day and year last aforesaid.*

Peter Barton
Notary Public

QUESTIONS FOR DISCUSSION
(Oral)

1. Which of these statements is correct? A deed is a certificate of ownership. A deed is a contract.

2. Brown offered White a deed which he refused to accept. Brown left it on White's porch. Does title pass?

3. X agrees to sell his house and lot to B. A written contract provides that B shall have immediate possession of the house, and that the deed shall be delivered when half of the purchase price is paid. When does the title pass?

4. Black, in a statement signed only by himself, promises to sell his farm Blackacre to Jones for $12,000. On a piece of paper separate and apart from Black's statement, Jones agrees to pay Black $11,500 for the farm. The papers were exchanged, Black being in possession of Jones' writing, and Jones holding Black's. Does this bind the parties?

5. A successful business man claims that "the deed must always be accompanied by 'an abstract of title' in order to pass title." If you do not agree, modify this statement.

6. An association contemplates the purchase of the land of a private school. Due to the continued chaotic condition of the former corporation, it is difficult to ascertain the outstanding obligations. How can the purchaser be protected against a defective title?

7. James Reese sold his farm to Miller. William Reese has the right to use a lane to cross the farm. Miller wants a clear title to the property. How will William release his rights?

8. Mrs. Gossip says that acknowledgments are required by law to keep the notary public in spending money. Can you show Mrs. Gossip that acknowledgments, especially of deeds, serve a useful purpose.

9. White deeded a city lot to Green who accepted the deed from White and deposited it in his trunk for safe-keeping. Two weeks later White gave Wise, a bona fide buyer, a deed for the same lot. Wise immediately had his deed recorded. Who has title to this property?

CASE PROBLEMS
(Written or Oral)

No. 258

A deed, otherwise complete, reads in part as follows: "I herebie grante bargane and sall and knovaie tu." Will this irregular spelling have an effect on the validity of the deed? (112 Va. 580.)

No. 259

Doe's father executed a deed for the purpose of delivering it to his son at some future time. The son took the deed from his father's room without the latter's knowledge or consent. Who has title to the land? (166 Ala. 337.)

No. 260

William White has concealed his true name and has assumed as an alias the name of J. J. Jones. A deed covering

land actually purchased by him is executed and names J. J. Jones as the grantee. Does this convey title to Jones?

No. 261

A and B enter into a contract to effect an exchange of farms of equal value. A contract was duly signed and abstracts of title were exchanged. Each of the parties has taken possession of the other's farm. Is anything else necessary in order to complete the transfer of ownership?

No. 262

Fox executed a deed to his farm in favor of his son. Fox then delivered the deed to his attorney for safe-keeping, with instructions to deliver it to the grantee upon the grantor's death. Does this delivery pass title? (67 Miss. 511.)

No. 263

Jones was the owner of a farm which he conveyed to Smith by warranty deed. Smith immediately moved his family upon the land and remained in possession, but did not attempt to record his deed. Sometime thereafter Jones presented to Brown an abstract showing title in Jones to this land. Relying upon the records, Brown bought the land from Jones. Immediately upon receipt of his deed Brown filed it for record. Afterwards Brown brought suit against Smith for possession of the land. Who is entitled to the land? (103 Mass. 491.)

No. 264

Adams owned a tract of forty acres of timber land. He felled sufficient of the timber and split it into rails to fence the land. He laid part of the rails into a fence and piled the remainder on the land. The land was then sold to Brown who took possession. The next day Adams demanded the rails in the fence and those piled on the land, claiming they were personal property. Brown refused to deliver any of them. Adams brought suit for the value of the rails. What should be the judgment of the court. (138 Mich. 1.)

Chapter XLVIII

WILLS: JOINT TENANTS: ADVERSE POSSESSION

Keep in mind these questions when studying this chapter:

1. **What is the character and purpose of a will?**
2. **What are the formalities incident to making a will?**
3. **When one dies intestate, how is his property distributed?**
4. **In what several ways may more than one person have rights in real property?**
5. **How may title be acquired by adverse possession?**

§ 293. **Wills.**—Title to land may be transferred by a *will.* A will, when used in a legal sense, is an instrument by means of which a person provides for the disposition of his property to take effect after his death. The person making the will is called the *testator;* if the gift is real estate, the beneficiary is called the *devisee;* if personal property, the *legatee.* One may dispose of his property as he wishes, except that the widow or widower cannot be deprived by will of the right of dower or curtesy, where such a right exists.

Any person of sound mind and proper age, may make a will. In some states, and under some circumstances, minors may make wills. Under the common law, a married woman could not make a will, but most of the states now permit her to do so. Those who are incompetent to make wills may, nevertheless, inherit property under a will.

The various states have different laws respecting the capacity to make a will. The majority require the testator to be twenty-one years of age and of sound mind, to dispose of real or personal property. By a sound mind is meant: Does the testator have sufficient mind and memory to know the condition, extent, and value of his property? Does he understand his relationship to the natural objects of his bounty—that is, to what extent they deserve his gifts?

§ 294. **Formalities.**—The essential formalities necessary

for the making of a will are usually as follows, it must be:

(1) In writing.
(2) Signed.
(3) Attested.

(1) *The will must be in writing.* No particular form is necessary and any words that convey the intention of the testator will be sufficient. Technical words should be avoided if the meaning can be made clear without them. It is essential that the will should conform in every detail to the requirements of the statutes in that state where the property is situated.

(2) *The will must be signed* by the testator, or by someone for him in his presence and at his express direction. Some states require that the will be signed at the end. If the testator cannot write, "his mark," properly attested will be sufficient.

(3) *The will must be attested* by a legal number of witnesses, not less than two, the number being dependent upon the statutes, and the statutes in this and every other respect in relation to wills must be strictly observed. A beneficiary should never act as a witness; the witnesses should be disinterested persons. Some states require that the witnesses must sign in the presence of the testator and of each other. The witnesses to a will should inscribe their addresses as well as their names.

Minors, if not too young, may act as witnesses. The witnesses should be personally acquainted with the testator, and be satisfied that he has sufficient mental capacity to make a will. It is not necessary that the witnesses know any of the contents. Their duty is merely to witness the signature of the testator and sign the attestation clause. The attestation clause should always follow the testator's signature and precede the signatures of the witnesses.

§ 295. **When effective.**—A will does not become effective until after the death of the testator. If the property devised should be conveyed before the will is in effect, then the will is inoperative in so far as that particular property is concerned.

The words most commonly used in a will to transfer the property of the testator are "give, devise, and bequeath." Devise is the technical word relating to transferring real property, and bequeath for personal property. A will conveying real property must be executed in conformity to the laws of the state where the land is situated. A will conveying personal property must be executed in conformity to the laws of the state where the testator has his domicile.

§ 296. **Distinguishing characteristics.**—A will has four distinct characteristics:

(a) The provisions of a will are construed by the courts with less technical strictness than a deed, or other written instrument. The intention of the testator is the controlling feature and the technical meaning of words and phrases must yield to such interpretation.

(b) A will conveying real estate must be executed in accordance with the laws where the land is situated; a will of personal property in accordance with the law of the testator's domicil. Where a will is designed to affect land situated in different jurisdictions, it must be executed in conformity with the laws of each place.

(c) A will is ambulatory, that is, revocable, during the lifetime of the maker, and at his pleasure.

(d) There is no natural or common law right to make a will. All authority by which wills are made is derived from some statute.

§ 297. **How revoked.**—A will may be changed, supplanted, or revoked at any time at the pleasure of the testator. It may be revoked by intentionally destroying it or by making a new will. If the will is destroyed, it must be by the testator or someone acting for him and in his presence.

§ 298. **Codicil.**—A codicil is a supplement or addition to a will, made by the testator, and is annexed to or to be taken as a part of the will by which the original dispositions contained in the will are expressly added to or altered. The word codicil literally means a "little will." A new will is usually intended and has the effect of revoking all previous wills, whereas a

codicil acknowledges the existence of and leaves in full force the previous will, of which it is a supplement, except so far as it undertakes to alter its terms. A codicil must be executed with all the formalities of the will itself; it must be signed, and witnessed in like manner.

Form of Will

I, Peter Sterling, of the city of Bellefonte, county of Center, and state of Pennsylvania, do make, publish, and declare this my last will and testament, that is to say:

(1) I give and bequeath to Henry Sterling, of Boalsburg, county of Center, and state of Pennsylvania, the sum of two thousand ($2,000.00) dollars.

(2) I give and devise to John Sterling, of the city of Bellefonte, county of Center, and state of Pennsylvania, all of lot numbered one (1) in block numbered two (2) in said city of Bellefonte.

(3) All the rest and residue of my property, real, personal, and mixed, of which I shall die seized or possessed, I give, devise, and bequeath to my wife, Mary Sterling.

(4) I hereby nominate and appoint the said Mary Sterling to be executrix of this will.

(5) I hereby revoke any and all former wills by me made.

In testimony whereof I have hereunto set my hand this tenth day of March, in the year nineteen hundred and twenty-seven.

Peter Sterling

Signed, published and declared by the above named Peter Sterling as and for his last will and testament, in the presence of us and each of us, who, in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses:

Henry Wiseman
of the county of Center,
and state of Pennsylvania.

William Williams
of the county of Center,
and state of Pennsylvania.

§ 299. **Title by descent.**—When an heir acquires the estate of his ancestor on the death of the latter, who dies intestate, the title is said to pass by descent.

Descent is the hereditary succession to real estate. When a man dies without making a will he is said to die *intestate*, and his real property under these circumstances goes to the persons whom the laws of the state where the land is situated designate as his heirs. Lands that thus descend are liable for debts of the ancestor, after the personal estate is exhausted.

It is a general law that the real estate of a deceased person descends first to his children, subject to the right of dower or curtesy in a surviving wife or husband. If there are deceased children, their heirs, if any, take as a whole the share their parents would have taken had they lived. Should there be no surviving children or grandchildren, the father is usually considered the next heir, next the mother, then the brothers and sisters. If there should be no relatives at all, the property will revert to the state.

Smith had three children, Bertha, Clara, and David. Bertha and Clara survived their father, but David died before his father, leaving two children, John and Mary. There are now two children and two grandchildren. Bertha and Clara will each inherit one-third of the estate, and John and Mary, the children of David, will take the share their father would have taken, each thus receiving one-sixth.

§ 300. **Joint estates.**—When land is owned by one person in his own right, it is said to be held in severalty, but when vested in two or more persons, it is held as co-owners.

The two principal estates of this character are:

(1) Joint tenancy.

(2) Tenancy in common.

(1) *Joint tenancy.*—When two or more persons hold land as a unit, they are said to be *joint tenants*. Each tenant has an equal share of the whole property. The distinguishing feature of this estate is the right of survivorship. When one tenant dies, the surviving tenant takes the other's share, free from any claim of the heirs of the deceased member even to the exclusion of the dower of the widow. Such estates have been either abolished or greatly modified by statutes in the different states.

(2) *Tenancy in common.*—When two or more persons hold any part of or interest in a parcel of land in common, they are said to be tenants in common. The property may be acquired by purchase or by inheritance, and one of the tenants may hold a greater interest than the other or others. Each member has the right to sell his interest, and the doctrine of survivorship does not apply. Upon the death of one of the owners his interest will pass to his heirs, subject to right of dower or curtesy, where such a right exists.

§ 301. **An estate by entirety** is where land is conveyed jointly to husband and wife, and upon the death of one the other becomes entitled to the entire estate. During their life, the husband has the possession and enjoyment of the whole estate.

§ 302. **Title by adverse possession.**—A person may acquire title to land by what is known as adverse possession. This is possession of land for a length of time adversely to the title of another and will ultimately give the title to the possessor of the property without written evidence of such ownership. In order to acquire title by this means it is necessary that the possession be hostile to the true owner and under a claim of right; it must be actual; it must be open and notorious; it must be exclusive; and it must be continuous for a period of time the length of which is usually covered by statute. In some states it is ten years, in others fifteen years, and so on.

QUESTIONS FOR DISCUSSION

(Oral)

1. A devised his farm to his oldest son, and made his daughter the legatee of all his personal property. A's wife is bequeathed one dollar. Is she entitled to more?

2. M made his will in January, 1926. During July he met with serious business reverses which caused him to take his own life. One of his sons, who does not participate in the distribution, seeks to have the will set aside. Will he be successful?

3. C, using a blank form of a will, wrote her own will, filled it out in her own handwriting, inserted her own name

at the top of the will, acknowledged it to be her last will and testament, in the presence of competent witnesses who signed it properly. C failed to sign it at the end. Would this document be accepted as her last will? (77 O. S. 104.)

4. Peter Sterling has prepared his will and is now looking around for suitable witnesses. Determined to keep the contents of his will from being "broadcasted," he seeks out two strangers in an adjoining village to attest his will. Was it necessary to go to all this trouble?

5. Goheen owned six hundred forty acres of valuable farm land. In his last will and testament he devised eighty acres to each of his eight sons. Before death he deeded this farm to the Home for the Blind. The sons refused to give up the farm. Will they be obliged to do so? (11 Ohio 287.)

6. Smith bequeathed his Packard car to McBride. The donee died before the testator. Do McBride's heirs get this automobile?

7. A's tin box containing valuables was opened by his three-year-old grandchild. When grandpa discovered that the box had been opened he was shocked severely and died a few days later. A search for the will resulted in fishing the document (duly signed and witnessed) out of the cistern. Will the distribution of the estate be made under the will or according to the laws of descent?

8. Is the following a valid will? If any defects exist point them out.

> I give and devise all my estate, real and personal to my wife, to be hers, and her heirs forever.
>
> Signed A. B.
>
> Subscribed by us in the presence
> of A. B.
> John Wiley. Martha Doe.

9. Adams and Brown purchased a building and owned the property as joint tenants. Brown had two sons who claimed half of their father's interest in the building after the father died. Result?

If the property had been a tenancy in common what would be your answer?

10. Adam Bede conveyed certain land to B—— and C—— who were husband and wife. B——, the husband, afterward died intestate leaving C——, and two children surviving him. To whom does the land belong?

CASE PROBLEMS

(Written or Oral)

No. 265

A husband and wife have an estate by the *entirety*, which consists of eighty acres. How many acres does the husband own, and how many does the wife own?

No. 266

In John Wiley's will, a fourteen-year-old nephew was made the beneficiary of $500 in cash, and a gold watch. An insane uncle was bequeathed $3,000 worth of bonds. Are these legacies valid, the will being in correct form?

No. 267

Mr. Howard moved his garage over the line upon the land of his neighbor, claiming that he has placed it on the true line. Mr. Howard continues in possession, without interruption for twenty years. After this time the neighbor sought to have the garage removed. He produced an old blue print prepared by a surveyor which showed that Howard had the garage three feet over his line. The latter refuses to give up the land. Must he do so?

No. 268

The testator, sitting in a carriage in the street, and looking up through a window, saw two witnesses attest his will. Was this attestation lawful? (177 Ill. 43.)

No. 269

A schoolhouse had been maintained on land uninterruptedly for nearly fifty years, when an officer of the district concluded that the district had no title to the land. The officer moved the house, and surrendered the land to the original owner. Who has title to the land? (31 Me. 381.)

Chapter XLIX

MORTGAGES OF REAL PROPERTY

Keep in mind these questions when studying this chapter:

1. **In what respect is a mortgage similar to a deed?**
2. **What are the rights and duties of the mortgagor, and mortgagee?**
3. **Why is it important to have a mortgage recorded?**
4. **How does a deed of trust differ from a mortgage?**

§ 303. **Introduction.**—In our present organized state of society, a large part of our commerce and business is carried on by means of credit or borrowed money. Prudent people cannot afford to lend money or credit without some assurance that the money will be returned or the debt paid. Mere promises are not sufficient; there must be something which creates a legal claim on the property of the debtor in favor of the creditor. From the earliest time, mortgages have been given on land as security for the payment of money.

§ 304. **Definition.**—A mortgage is a conveyance of property upon a condition, as security for the payment of a debt, or the discharge of some obligation. A mortgage is similar to a deed, and must be signed, sealed, acknowledged, delivered, and recorded. It conveys the land as fully and in the same way as if it were sold outright, but with a condition. This condition consists of a stipulation to the effect that if a certain sum of money is paid at a stated time, then the title is to revert to the one giving the mortgage, or that the conveyance is to be void and of no effect.

In general, any interest in land that may be sold, granted, or assigned, may be the subject of a mortgage. Land may be mortgaged separately from the improvements, or the improvements separately from the land. Leases, crops, dower of the widow, or curtesy of the husband, are some of the various interests that may be mortgaged.

Rivers is desirous of buying a home. He negotiates for the purchase of such a place for $10,000. It is agreed that he is to pay $3,000 as the initial payment, for which he is to receive a warranty deed. He is to give back to the seller a mortgage (or deed of trust) for the remaining $7,000 payable in annual installments of $1,000 each, with interest on the unpaid balance at 6 per cent per annum. At the end of two years Rivers meets with financial misfortune and is unable to make further payments. The seller re-takes the place, and Rivers loses his payments. Rivers may succeed in finding someone who will buy his interest (usually referred to as an equity) and thus reduce the amount of his loss.

§ 305. **Formation.**—A mortgage should be drawn and executed with all the formality required in a deed; it should likewise be recorded. If not recorded it is void as against a subsequent purchaser or mortgagee, who had no knowlege of the mortgage.

Plaintiff conveyed his farm worth $15,000, by a deed, for a consideration of $5,000. There was a separate written instrument granting the plaintiff the privilege of repurchasing the farm within four months from date upon the payment of $5,000. The court held the transaction to be a mortgage and decreed that the grantor be allowed to redeem although more than the four months had elapsed. (12 Howard 129.)

§ 306. **Second mortgage.**—Property is sometimes mortgaged two and three times. In such a case the second mortgage should recite that it is given subject to a prior mortgage. A second mortgage is not, as a rule, very desirable. The holder of the first mortgage may sell the property to satisfy his claim, in case of default in payments, and if he does so the holder of the second mortgage would have to buy the property or redeem the first mortgage to protect his claim.

§ 307. **Recording.**—The recording of mortgages is important. If a second mortgage holder should succeed in having his mortgage recorded first, he would have prior claim to the property over the first mortgage. There have been many known cases of knavery in which a man has given several mortgages on the same property, each mortgagee believing that he has the only mortgage on the property. Where this occurs, the mortgage first recorded would have the first claim irrespective of the date of the mortgage.

Common Form of a Mortgage

Know all men by these presents.

That Thomas Timmons, of Montgomery County, Ohio.

in consideration of One Thousand (1,000) Dollars

to him *paid by* Peter Sterling

the receipt whereof is hereby acknowledged, does hereby **Grant, Bargain, Sell and Convey** *to the said* Peter Sterling, his *heirs, and assigns forever,*

Lot thirty-two (32) block six (6) in Oxford Park, an addition in Dayton, Ohio, as per recorded plat thereof.

and all the **Estate, Title and Interest** *of the said* grantor *either in Law or Equity, of, in and to the said premises;* **Together** *with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof;* **To have and to hold** *the same to the only proper use of the said* grantee his *heirs,* ~~successors~~ *and assigns forever.*

And the said Thomas Timmons *for* himself *and* his *heirs, executors and administrators,* ~~successors~~[1] *does hereby* **Covenant** *with the said* Peter Sterling his *heirs,* ~~successors~~ *and assigns, that* he is *the true and lawful owner of the said premises, and has full power to convey the same; and that the title so conveyed is* **Clear, Free and Unincumbered; And further,** *That* he does **Warrant and Will Defend** *the same against all claim or claims, of all persons whomsoever; Provided, Nevertheless, That if* the said Thomas Timmons shall well and truly pay or cause to be paid, his certain promissory note of even date herewith, for One Thousand (1,000.00) Dollars drawn to the order of Peter Sterling and payable in three years from date, with interest at six (6) per cent per annum *then this mortgage shall be void.*

In Witness Whereof, *The said* Thomas Timmons *has hereunto set* his *hand this* twenty-second *day of* August *in the year of our Lord one thousand nine hundred* and twenty-eight.

Signed and acknowledged in presence of

D. W. Carter

Lon J. Kreibiel

Thomas Timmons

§ 308. **Right of possession.**—The modern interpretation in relation to the possession of the mortgaged premises is that the mortgagor is the owner of the property and is therefore entitled to retain possession. This he may do until he fails to fulfill his agreement by defaulting in the payment of his debt and till he has been lawfully removed by foreclosure or other legal proceedings. A mortgage is now considered merely as security for the debt and not as an absolute transfer of the title. So it has been held that the mortgagor may sell, lease, or otherwise dispose of the property, subject of course to the mortgage; and he is entitled to the rents and profits from the place and its crops.

§ 309. **Duties of the parties.**—It is the duty of the mortgagor to pay the interest upon the day when due, to pay the taxes and any other assessments against the property, and to keep the buildings insured. He must not impair or otherwise destroy the value of the security.

It is the duty of the mortgagee to give a written satisfaction upon the payment of the debt. This may be done by a quitclaim or release deed, or by an acknowledgment of satisfaction, release, or discharge, drawn by the recorder of deeds on the margin of the record of the mortgage, which must be signed by the mortgagee or by the lawful holder of the mortgage.

§ 310. **Equity of redemption.**—This is the right of the mortgagor to redeem his property, and is largely regulated by statute laws of the various states. At one time it was the rule that if the debt was not paid on the day when due, the mortgagor had no further right in the property. This worked such a hardship and injustice that the courts allowed the mortgagor the privilege of redeeming the property at any time before it was foreclosed, but a foreclosure deprived him of his right. Now the statutes of some of the states permit the redemption of the property for a limited time even after it has been foreclosed, by paying the debt, interest, and costs.

§ 311. **Foreclosure.**—The mortgagee has a right to foreclose upon the default of the mortgagor. This usually includes a sale of the mortgaged property under an order of court, and

generally by an officer of the court. The method of these proceedings differs in the various states. If any surplus remains after the property is sold, it must be paid to the mortgagor. But if there is a deficiency, an action may be brought for the amount remaining due.

§ 312. **Deed of trust.**—Trust deeds are now used extensively in some states in place of ordinary mortgages, for securing the payment of debts. In a trust deed, the property is conveyed to a disinterested party called a trustee, who holds the title for the benefit of the creditor. If the conditions of the trust are not complied with, the trustee sells the property and applies the proceeds to the payment of the debt secured. Such a deed is especially convenient when the debt secured is owned by several persons. The debt may be evidenced in the form of a number of notes or bonds with one deed of trust to secure them.

It is the duty of the trustee to make the foreclosure when default has been made in making payment. The proceedings are very similar to the foreclosure of an ordinary mortgage. The procedure in either case is largely a matter of statutory law.

QUESTIONS FOR DISCUSSION
(Oral)

1. Bede says to Sterling, "I will lend you $100 when you deposit your watch and ring with me. These articles will be returned to you upon repayment of your loan." What kind of a transaction is this?

2. Bede said to Sterling, "I will lend you $1,000 on the security of your promise to deed me your farm, which I will convey back to you upon payment of your debt." What kind of a relationship does this create between Bede and Sterling?

3. Adams mortgaged his property to Brown to secure a loan. A week later Comer, without notice of Brown's mortgage, made a loan to Adams and took a mortgage on the same property. Comer immediately had his mortgage recorded.

Davis took a mortgage on the property one month later and had the mortgage recorded. What are the respective rights of Brown, Comer, and Davis upon default by Adams?

4. Allen mortgaged his farm to Black to secure a loan which ran from March 1 to January 1. Allen harvested the crops during this term and kept the proceeds. Black contends the proceeds are his, and consults a lawyer as to the advisability of bringing suit. What is your advice?

5. The mortgagor of a farm took down some small sheds, and was ready to tear down a large barn and silo. He also contemplated making some material changes in the house which might impair its value. The mortgagee seeks to compel the mortgagor to restore the premises to as good a condition as they were previously. What are his rights?

6. Suppose a storm had badly damaged mortgaged premises, and destroyed their value, would the mortgagor be under legal obligation to repair the damages? To guard against such losses what would you advise the mortgagee to do? (9 Johns. Ch. [N. Y.] 534.)

7. Doe's loan, which was secured by mortgaging his farm, was due on the first of January. Suppose he defaulted payment at that time, did the title to the farm then immediately vest in the mortgagee?

8. The mortgagee enforced his rights against the mortgagor by a suit of foreclosure. The mortgaged premises were duly sold and netted money in excess of the debt. What disposition should be made of the excess amount?

9. In the foregoing case if there is a deficiency, what is the next procedure?

10. Why should the wife sign the mortgage with the husband?

11. Is there any particular difference between a mortgage to a parcel of land, a deed of trust, or a quitclaim deed?

12. Does a promissory note or a bond always accompany a mortgage or deed of trust?

CASE PROBLEMS
(Written or Oral)

No. 270

Smith borrowed money from White. He deeded his house to White with the understanding that if Smith paid the loan by July 1 "the deed shall be null and void." Smith failed to pay on July 1, but tendered the money two months later. White refused the money, claiming the house was now his. In your judgment can Smith recover? (29 Am. Rep. 37.)

No. 271

Allen, being in urgent need of money, borrowed the needed amount from Baker and gave as security a mortgage on a parcel of land Allen owned. The loan was not paid at its maturity and Baker brought an action in court to eject Allen, claiming that Allen's failure to pay gave Baker legal title to the property. Is his contention correct? (191 N. Y. 306.)

No. 272

Gordon gave a mortgage on his farm, Blackacre, to Ware to secure a loan. Gordon agreed to take out an insurance policy on the improvements, "loss, if any, payable to Ware," and to deliver the policy to the mortgagee. Gordon took out the insurance but had the policy made payable to himself, and retained it. Before the mortgage was paid off, the buildings were destroyed by fire. Is Gordon or Ware entitled to the insurance proceeds? (115 Mass. 588.)

No. 273

Brady mortgaged his farm to Waldron. Brady remained in possession of the property. A violent wind storm damaged the barn and other outbuildings of the premises so as to impair the value of the property. Waldron brought a suit against Brady to compel him to repair the damaged property. What is the rule in such a case? (2 Johns, Ch. [N. Y.] 148.)

Chapter L

LANDLORD AND TENANT

Keep in mind these questions when studying this chapter:

1. **How does the relation of landlord and tenant arise?**
2. **What are the rights and duties of the lessor?**
3. **What are the rights and duties of the lessee?**
4. **An effective lease should include what general conditions?**
5. **How and when is a lease terminated?**

§ 313. **Parties.**—The term, *landlord*, is applied to the owner or holder of lands, or houses, which he leases to a tenant or tenants. He is also called the *lessor*. In every lease there must be a lessor able to grant the land, and property capable of being granted. The one who holds the lands or tenements of or under another is called a *tenant* or *lessee*. The relationship existing between the landlord and tenant is created by a contract express or implied. The possession of the property and the payment of, or agreement to pay, rent for its use, are the distinguishing characteristics that determine the relationship of landlord and tenant.

An ordinary agreement for board and lodging in a house by which the keeper retains the legal possession and care of the whole house, does not create the relationship of landlord and tenant.

§ 314. **The lease.**—The contract between the landlord and tenant, for the possession of property rented for a specified time, is termed a *lease*. A lease to one for the term of his or another's life is called a lease for life. If for a specified time, it is called a lease for years. One who holds the use and possession of the property, at the will of the lessor, and who may terminate it at his pleasure, is a tenant at will. A tenancy at will frequently arises when a tenant, with the consent of the landlord, holds over after the termination of a lease. In many jurisdictions, however, this constitutes a tenancy from year to year.

Davis gave to Roberts the following signed memorandum: "I, L. M. Davis, have this day rented to S. Roberts the S. W. quarter of the S. W. quarter of Section 16, etc., for the term of ten years, for which he agrees to pay me an annual rent of $50; and if he pays me the above named rent, I agree to make S. Roberts a good and sufficient warranty deed to said land." Roberts paid the rent during the specified term of years, and then demanded from Davis a deed. Davis refused to make a deed, contending that the memorandum was merely a lease, and that there was no consideration for the promise to convey the property.

The court ruled in favor of Roberts. While the contract purported to be a lease, it was held to be a contract for the purchase of land on the installment plan. Parties may contract with reference to land, with the option of treating it as a sale or a lease.

§ 315. **Form.**—Leases may be either oral or written. If the time is to extend beyond a certain period, the lease must be in writing. This is provided for by the statutes of the different states. In some states it need not be in writing if for less than three years, while in others it must be in writing if for one year or more.

Much of the law pertaining to landlord and tenant is based on the English law. The words—landlord and tenant—indicate their origin,—landlord, lord of the land. The English law is favorable to the landlord. For this reason, especially, leases should be in writing, with the rights and duties of both parties fully stated.

No particular phraseology is necessary to constitute a lease. Any words that will express the intentions of the parties will be sufficient. It is important that the lease state in plain language all the conditions of the contract that there may be no misunderstanding. The usual requisites of a formal written lease are:

(1) The date.
(2) Names of the parties.
(3) Consideration.
(4) Property leased.
(5) Conditions.
(6) Duration.
(7) Signatures.

(1) *The date.*—If there is no date, the lease will be construed to take effect from delivery. The date fixes the time for the commencement of the tenancy, unless the lease itself fixes this time.

(2) *Names of the parties.*—The names of both parties to the lease should be given. The entire omission of the lessee's name from a lease renders it void.

(3) *Consideration.*—An agreement to pay a certain sum, or any stipulated article, such as grain or ore, or the rendering of some service, will be a good consideration. Time of payment and the place where the rent is payable should be definitely stated in the lease. If no place is specified for the payment of the rent, it is understood to be on the premises.

(4) *Property leased.*—There should be an adequate description of the property leased.

(5) *Conditions.*—Any special conditions or requirements should be stated clearly and explicitly. If the tenant is to pay the taxes, make repairs, or is prohibited from subletting, and the like, these conditions should be enumerated.

(6) *Duration.*—The time for which the premises are let should be definitely stated.

(7) *Signatures.*—The written lease must be signed by both parties thereto, or by a duly authorized agent in the name of his principal. In some jurisdictions, it must also be witnessed by one or more witnesses.

§ 316. **Covenants in a lease.**—The covenants in a lease may be express or implied. Express covenants are those that appear in a lease, formulated in language. Implied covenants are those that are understood and are incident to and result from the relation of landlord and tenant.

The implied covenants on the part of the landlord are: (1) that he will put the lessee in possession of the premises; (2) that the lessor has a right to make the lease; and (3) that he will protect the tenant against any interference from anyone who claims to hold a better title than the lessor.

On the part of the lessee, the covenants implied are: (1) that he will pay rent during his occupation—to pay a reasonable rent if the amount is not stipulated; (2) that he will use the premises and treat the property in a proper manner. He

must use reasonable care to prevent damages and will be liable for waste committed on the premises; and (3) that he will surrender the property at the end of the term in practically the same condition in which it was received, subject to ordinary wear and depreciation.

§ 317. **Landlord's rights.**—The landlord has the right to re-enter and take possession of the property if the tenant abandons it before the expiration of the lease. He may also do anything necessary to protect his property from loss or damage that does not interrupt or interfere with the tenant's right of possession. Otherwise he has no more right to enter the premises of his tenant than have strangers. If he does so he is guilty of a trespass. Since he has, in effect, conveyed the premises to the tenant for the time stated in the lease, the landlord has no more right to interfere with the tenant's peaceable possession than he would have to enter upon the premises of one to whom he had given a deed or other conveyance to property.

§ 318. **Landlord's duties.**—It is the landlord's duty to pay the taxes and other assessments on the leased property unless it is otherwise agreed in the lease. He is under no obligation to make repairs or to pay the tenant for any improvements made to or upon the property unless it is so provided in the lease. If the house is out of order, the tenant cannot require the landlord to put it into good condition. If the leased buildings are destroyed through no fault of the lessor, he is under no implied obligation to rebuild.

§ 319. **Tenant's rights.**—The tenant is entitled to the peaceful and undisturbed possession of the property. He has this right against the landlord as well as other persons. Unless the landlord consents to the abandonment, the tenant will be liable for any unpaid rent due under the lease.

The tenant has the right to make reasonable alterations needful for the particular use for which the premises have been leased, where the purpose is known to the landlord, but if unknown, the latter has a right to believe that they will be used for the purpose for which they are naturally fitted without alterations.

The following is a form of an ordinary lease:

This Lease Witnesseth:

THAT Simon Smith, does
HEREBY LEASE TO Adam Bede
the premises situate in the City *of* Richmond *in the County of* Henrico *and State of* Virginia *described as follows:*

The dwelling house, known as number 1802 East Broad Street, in the City of Richmond, State of Virginia.

with the appurtenances thereto, for the term of two years *commencing* January 1 *19* , *at a rental of* Fifty (50) *dollars per* month, *payable* monthly

SAID LESSEE AGREES *to pay said rent, unless said premises shall be destroyed or rendered untenantable by fire or other unavoidable accident; to not commit or suffer waste; to not use said premises for any unlawful purpose; to not assign this lease, or under-let said premises, or any part thereof, or permit the sale of* his *interest herein by legal process, without the written consent of said lessor ; and at the expiration of this lease, to surrender said premises in as good condition as they now are, or may be put by said lessor , reasonable wear and unavoidable casualties, condemnation or appropriation excepted. Upon non-payment of any of said rent for* ten *days, after it shall become due, and without demand made therefore; or the breach of any of the other agreements herein contained, the lessor may terminate this lease and re-enter and re-possess said premises.*

SAID LESSOR AGREES (*said lessee having performed* his *obligations under this lease*) *that said lessee shall quietly hold and occupy said premises during said term without any hindrance molestation by said lessor ,* his. *heir or any person lawfully claiming under them.*

Signed this first *day of* January *A. D. 19*

IN PRESENCE OF:

L. E. Edwards
E. R. Foster

Simon Smith

The tenant has no right to make alterations for other uses than for which the premises were leased, without the consent of the landlord, although such changes might be an improvement to the property. The tenant must be satisfied with the premises as they stand when leased and the landlord has a right to expect that they will remain so. This does not prevent the tenant from making temporary alterations which may be removed at the expiration of the term without injury to the property.

Everything that is appurtenant to leased land goes with it. By appurtenant is meant that which belongs to something else, but of less importance than that to which it appertains or belongs. A right of way is an appurtenance; trees are appurtenant to the soil. Therefore, the lessee who rents property has a right to everything appertaining to the soil, as houses, fences, trees, shrubbery, but not those things of a temporary character not belonging to the soil as implements, machinery or animals.

If a tenant rents a house, he has a right to the lot, barn, trees, and the like. If the premises leased are part of a tenement house, he has a right to the use of the front door, the door bell, a place for drying clothes, and other customary conveniences.

§ 320. **Tenant's duties.**—It is the first duty of the tenant to pay the rent. For non-payment he is subject to eviction. Upon a failure to pay, the landlord must first make a demand for possession or serve a notice on the tenant to quit. If the demand is refused or the premises are not vacated, then a suit may be brought for the possession of the property.

The tenant should see that his landlord has title to the premises leased. If the title is defective, the lessee cannot acquire a better title than the landlord himself possesses. The lessor may have but a life interest in the property, which will cause the lease to expire with the death of the landlord. The property may be encumbered with a mortgage liable to foreclosure at any moment, thus putting an end to the lease. Or the landlord may himself be merely a lessee with no rights to sublet.

It is the further duty of the tenant, unless otherwise stipu-

lated, to keep the leased property in repair during his term, so that it shall return to the lessor in as good condition as when it was leased, ordinary wear and use excepted. Aside from an agreement to the contrary, he is merely required to take reasonable care of the premises. Hence, he would not be obliged to replace a window broken by a stranger. If the property is destroyed by fire or otherwise without the fault of the tenant, the lease is ended and he is released from obligation to pay further rent.

If the landlord is to keep the premises in a tenantable condition, it should be so stated in the lease, since verbal promises would not be binding. A written lease is presumed to contain all the agreements. A verbal promise to make repairs after the execution of the lease would be void unless there was a consideration for the promise. A promise by the landlord to make repairs, upon a threat of the tenant to move unless they were made, where the lease is unexpired, would not be binding, as the tenant is already under obligations to remain until the end of the term.

The tenant may sublet if his lease contains no provisions to the contrary. If there is a clause prohibiting the subletting of the premises and the tenant nevertheless sublets, he will be, as before, liable for the rent and also for any damages the landlord can show he has suffered by the violation of the lease.

§ 321. **Termination of lease.**—A lease for a fixed time expires with the arrival of that time. The lease may contain a stipulation that in case the tenant fails to pay his rent the landlord may declare the lease forfeited. If, after a breach, the landlord takes no steps to enforce his option, it will be deemed a waiver of the breach. If the landlord accepts from the tenant rent that accrued after the breach, this will also be considered a waiver. The landlord may accept the voluntary surrender by the tenant of his interest in the property before the expiration of the lease. A mere abandonment without the assent of the lessor is not a surrender, but a breach of contract on the part of the lessee.

Where there is a lease from year to year, the party seeking to terminate the agreement must notify the other party in writing of his intention to quit. This notice may be given by

either party. The statutes provide the time and manner of giving such notice.

Notice of Tenant Terminating Tenancy

Denver, Colo., October 1, 19__

Mr. Abel Boone,-

I hereby give you notice that I will quit and deliver possession, November 1, 1928, of the premises No. 110 Champa Street, in the city of Denver, Colo., which I now hold as tenant under you.

John Doe

When a tenant remains in possession of the property after his lease has expired with the consent or assent of the landlord, or if the landlord accepts the rent, it will be construed as a renewal of the lease upon the same terms and conditions.

When a lease is for a certain definite term, whether this be for a month, or for a year, at the expiration of this set time, the tenant may be evicted by the landlord as a trespasser, should he continue in possession of the property, but if the tenant offers to pay rent, and it is accepted, this will create a new lease by implication for another term of the same length.

At any time the tenant fails to pay rent the landlord may evict him. If the landlord accepts any part of the rent due, he cannot then evict, but must bring a suit to collect the remainder of the rent.

Landlord's Notice to Quit or Pay Rent

To Benjamin B. Brown:

You are hereby notified that there is now due me the sum of seventy-five dollars, being rent for the premises situated in the City of Pittsburgh in the state of Pennsylvania, and known and described as follows:

No. 101 Broad Street.

And you are further notified that payment of said sum so due has been and is hereby demanded of you, and that unless payment thereof is made on or before the 15th day of April, 19__ your lease of said premises will be terminated.

Dated this tenth day of April, 19__

Samuel Smith [SEAL]

Landlord.

QUESTIONS FOR DISCUSSION
(Oral)

1. In a lease as well as in a bailment there is a transfer of temporary ownership of property. What difference do you note in respect to the kinds of property involved?

2. Plaintiff Wilson leased his house furnished, to defendant Dawes. What kind of a legal relationship is created by such an arrangement?

3. Knight in an oral agreement with Yetter, leased his cottage at the lake to the latter for the summer. Yetter tried to avoid the contract on the ground that this being an agreement involving real estate it must be in writing. What is your opinion about it?

4. If, in the foregoing case, the oral agreement covered the rental of the cottage for two summers, would that make any material difference?

5. Greene leased his garage to White, the lease containing no covenant of quiet enjoyment. While White was in possession Greene removed the double doors for the purpose of making some alterations. During this time a hail storm seriously injured White's car. Is Greene liable for the damage?

6. Due to a runaway street car which crashed into the window of a store leased by Zaner, the latter's merchandise was seriously damaged. The street car company indemnified Zaner, and also his landlord, for the damages. The landlord, however, refused to buy a new window. What are the tenant's rights and the landlord's duty?

7. Due to the defective condition of a stairway, used in common by tenants of different rooms, Olson, one of the tenants, fell and broke his arm. He sues the landlord for the injuries sustained. Result?

8. Arnold leased the northeast corner of a four-story building. The entire third and fourth floors were destroyed by fire. Must Arnold continue to pay rent until the end of the term of the lease? (28 Ind. 103.)

9. Prior to leasing his farm to A. B. Jones, the lessor stored all his implements in a shed on the premises. Jones puts all of these implements to use in the spring without permission from the owner. Does Jones need this permission?

10. In an oral agreement which was to be reduced to writing later, Allen leased his farm to Sampson for four years. Sampson took possession of the farm and remained there until the end of the third year, paying $1,500 rent per year. Failing in his attempt to get a tenant for the fourth year, Allen sued Sampson for $1,500. Can he recover in a lawsuit if the agreement was not reduced to writing?

CASE PROBLEMS
(Written or Oral)

No. 274

Plaintiff Wright has leased his property at 414 North Main Street to defendant. Before the expiration of the lease, the entire building is destroyed. Can he collect the rent for the unexpired period if he does not rebuild? (6 Mass. 63.)

No. 275

A lessee in the contract covenanted absolutely to "repair every and any part of the house." The building was accidentally destroyed by fire through no fault of either the lessor or the lessee. Who suffers the loss? (95 Fed. 229.)

No. 276

A servant of the tenant, who was injured by falling plaster while at work in the kitchen, seeks to recover damages from the landlord. Will she succeed under the law? As a question of common sense should she be entitled to damages?

No. 277

Morse leased to Linn a house known as No. 411 Broadway, for one year, at a yearly rental of $300, payable monthly. Linn continued in the house after the expiration of the term, and Morse continued to accept the monthly payments. How can Morse recover possession of his property?

Chapter LI

FIXTURES

Keep in mind these questions when studying this chapter:

1. **What is the general meaning of the term fixtures?**
2. **Under what conditions may fixtures be removed?**
3. **What determines whether a fixture is classified as real property or personal property?**

§ 322. **In general.**—The term *fixtures* is applied to articles of a personal nature which have been affixed to land. The word is sometimes used in a dual sense: first, it may be to denote things that cannot legally be removed in case of sale by the owner who has affixed them; second, it may be to denote those personal chattels which have been annexed to land by a tenant and which may afterwards be severed and removed by the person who affixed them or by his agent, and against the will of the owner of the land.

The law of fixtures is of importance, particularly in determining the rights of a landlord and of a tenant in the removal of personal chattels by the tenant which he may have annexed to the land. It is also important to know what the owner of real property may legally remove, in case of a sale, where no reservations have been made.

If a chattel is attached to the land by the owner with a view of improving the property, it becomes a fixture and will pass with a sale of the property, unless it is expressly reserved by the terms of the contract of sale. This does not mean that he may not remove the fixture at will and do as he pleases with it at any time before he sells or makes a contract of sale of the land.

King leased certain land with the privilege of removing the pumps, engines, and all machinery used in working gas and oil wells. The court held that the tenant had a right to remove these fixtures within a reasonable time after the expiration of the lease. (56 W. Va. 75.)

Lord purchased a tract of land from the defendant. After the sale, the defendant sought to enter upon the land to remove fruit trees and ornamental shrubbery he had planted. No reservation had been made permitting their removal. The defendant contended these items were in the form of fixtures and he, therefore, had a right to remove them.

The court ruled that, as between buyer and seller, the trees were a part of the real property, and belonged to the purchaser. (39 Ill. 28.)

§ 323. **Difficult to determine.**—A fixture is defined as an article of a personal nature which has been so affixed or annexed to land that it may be regarded as realty. It is frequently difficult to determine whether the article affixed has become a part of the realty as a fixture and thus ceased to be regarded as personalty.

Whether a certain article shall be considered as realty or personalty may depend upon one or more of these conditions:

(1) The permanency of the annexation.
(2) The purpose or use of the thing annexed.
(3) The relation of the parties.

If the article affixed to the land loses its identity or is irremovable on account of the damages that might injure the real estate, then it becomes a fixture and is considered real property; as, brick in a wall, boards on a house, or shingles on a roof.

If the removal of the articles affixed does not materially injure the realty, as gas fixtures in a residence, counters and shelving in a store, or machinery in a factory, they will be considered as personalty and may be removed.

The article may even be physically affixed to the realty in some instances by the tenant and yet be considered as personalty. Thus, an engine bolted down in a building, but used as an accessory in conducting a trade or business would be removable.

At common law, everything that became affixed to the freehold became a part of it and belonged to the landlord. Later, exceptions were made in the case of trade fixtures for the purpose of encouraging trade and commerce; these exceptions were soon extended to include domestic and ornamental fixtures. In time, the law in relation to fixtures has become filled with many intricacies and many contradictions, indeed so many that very few general rules are applicable. Each case must be largely determined upon its own circumstances and according to the decisions of the jurisdiction where it is to be adjusted.

§ 324. **Trade fixtures.**—It is the policy of the law to encourage trade and commerce, hence much latitude is allowed

the tenant to remove those things annexed for the purpose of trade, provided, of course, the removal does not result in permanent injury to the property to which annexed.

The following items have been held to be trade fixtures: Shelving in a store, ice boxes in a hotel, temporary partitions, machinery attached with bolts and screws, temporary structures in amusement parks, nursery stock, portable garage, etc.

Buildings placed upon the land with the consent of the owner, or if his consent is obtained after the building is erected, remain the personal property of the tenant. But if the building should be erected against the consent of the landlord or where his consent is never obtained, it becomes realty. To avoid disputes the parties should always stipulate in the contract what property, in the nature of a fixture, shall be considered real and personal property. They will in that event be bound by their contract.

In the absence of an agreement, removable fixtures must be removed during the time for which the premises are leased, or while the relation of landlord and tenant exists under the original lease.

QUESTIONS FOR DISCUSSION
(Oral)

1. Sam Smart is about to engage in business in a leased building. It will be necessary for him to install a great many fixtures and make some changes in the rooms of the building. What should he do to protect his rights?

2. A farmer is about to rent a farm for a period of years. It will be necessary for him to make some improvements, and erect buildings for the successful operation of the farm. He is in doubt as to his rights to remove these improvements at the expiration of his lease. What would you advise him to do?

3. Mention the trade fixtures common (a) in a drug store; (b) in a grocery store; (c) on a farm; (d) in a printing plant; (e) in a business college.

4. When does a fixture lose its character as personal property, and become a part of the realty?

5. Where "the owner attaches articles to a building, they

are regarded as realty and pass with a sale of the property" but where "the tenant attaches articles to a building for the purpose of trade, they are regarded as personalty and do not pass with a sale of the property." Discuss the reasons for these rules of law.

CASE PROBLEMS
(Written or Oral)

No. 278

A public spirited citizen, who owned a large tract of land near the city, decided to turn part of the land, on which there was a fine grove of shade trees, into a picnic ground. To this end he erected a temporary building out of rough boards, with a fireplace in one end. He placed a cook stove, a sink, and a pump connected with a well at the other end. He also built tables and benches outside of the building; he placed several swings in the trees, and to do so he had to sink bolts into the limbs of the trees. At the end of the season the owner sold the farm and made no reservations in regard to the improvements used for picnic purposes. He now seeks to remove the above mentioned articles. What are his rights in this regard? (L. R. A. 1918 E. 149; 45 Am. St. Rep. 285.)

No. 279

The owner of a city lot, upon which is located a store building with shelving, gave a general warranty deed of the premises to a buyer. The owner described the property as real estate. After closing the deal, the seller claimed the shelving, but the buyer said the shelving, as well as the store building, were his. Which one is right, there being no agreement on the subject except the recital in the deed which merely described the city lot as real estate? (59 N. W. 219.)

No. 280

A tenant engaged in the mercantile business put up shelving in the ordinary way in the store. When his term expired, he attempted to remove the shelving. He had no agreement with his landlord as to the removal or non-removal of the shelving. The tenant claimed it was personal property, and as such was subject to removal. Which one do you believe is right? (83 At. Rep. 209.)

Chapter LII

TORTS

Keep in mind these questions when studying this chapter:

1. **In what respect does a tort differ from a contract?**
2. **In what respect does a tort differ from a crime?**
3. **May certain offenses constitute crimes as well as torts?**
4. **How are torts punished?**
5. **What kind of offenses are classified as torts?**

§ 325. **Introduction.**—The law recognizes certain rights as belonging to every individual. There is the right to personal security, to liberty, to property, and to reputation. These are personal rights. The law attempts to safeguard these rights by affording legal protection against interference from others. Such protection adds to the security of each member of organized society.

The law also recognizes that certain duties and obligations attach to each member of society. Among these obligations there is the duty of not deceiving others by false representations, of not prosecuting another maliciously, of not using one's property so as to injure others, and the like.

A violation of any of these rights is termed, in law, a tort. The word tort is used in law to denote a wrong or wrongful act, which consists of a breach of an obligation imposed by law, as distinguished from a breach of an obligation created by contract.

The word "tort" is from the French, which in turn borrowed it from a Latin word "tortus," meaning twisted. Its literal meaning is a wrong. In a further study of words and their derivations, you will discover many words in common use derived from the same source as, tortuous, torture, distort, retort, contortion, extortion, and others of a similar character.

A tort should be distinguished from a crime. Both are wrongs. A tort affects the individual; a crime affects the public or society. The punishment in one case is in the form of

compensation to the injured person; in the other it is in the form of punishment to the wrongdoer. In a criminal offense the proceedings are brought by the state, but a tort must be prosecuted by the injured person. While a tort is distinct from a crime, the same act may be, and often is, both a crime and a tort. There may be instances in which a tort may also involve contracts, as when one cheats another in a trade.

Illustration of a Crime, a Tort, and a Breach of Contract.—Doctor X enters into an agreement to care for Richard Roe while ill. The doctor intentionally administers poison to the patient with the intention of killing him. Administering the poison is a crime for which the state will punish the doctor. Roe may bring an action against the doctor for either a breach of his contract, or for a tort for the injury, as compensation.

Examples of a Tort.—Roe in a fit of anger strikes Doe. Roe has committed a tort called an assault and battery for which he may be punished criminally by a fine and imprisonment, and the party beaten may recover damages in a civil suit.

If one enters upon the land of another without permission he has committed a tort, called a trespass to property.

Attacks upon one's reputation by writing or speaking malicious words derogatory to his character, amounting to libel or slander, is a tort.

Infringements of patents, copyrights, trademarks; selling tainted meats or unwholesome provisions for human consumption; maintaining a nuisance, such as a foul or imperfectly constructed sewer or gas main; injuries caused by defective sidewalks, highways, bridges; the careless use of firearms, teams, automobiles, locomotives, and the like, are further examples of wrongs constituting a tort.

If a chauffeur is driving his master's car in the ordinary course of his duty, and by his negligence he runs over a person and injures him, this is a tort for which the master may be liable in a civil action. With regard to the chauffeur he may not only be guilty of a tort, but of a criminal offense as well.

§ 326. **Libel and slander.**—As noted elsewhere, every person is entitled to the right and security of person, property and reputation. The law recognizes the value of a good reputation, strives to protect it, and give redress for its injury. Making statements that are untrue of another, of such a nature as to injure the character and reputation of the one defamed, makes the offender liable for damages. The law assumes in advance:

(1) That every person has a good reputation.

(2) That statements made against one's reputation are false.

(3) That false statements are made maliciously, or with the purpose of causing injury.

Thus, to falsely circulate of another that he has been guilty of perjury, to call a merchant a bankrupt, a clergyman a drunkard, or to accuse one of a disgraceful crime would make the offender liable to the injured person for damages.

(1) *Defamatory words.*—Words are said to be defamatory if they tend to bring a person into contempt, disgrace, or ridicule of his fellow man. False and defamatory words, if written are libel; if spoken they are slander. Libel is the greater offense. It implies more deliberation in the intention of injuring another, and is calculated to circulate more extensively. Oral words are frequently soon forgotten, or are likely to be misunderstood.

One need not be the author of the defamatory words to be guilty of libel or slander. It is sufficient to repeat what is said by others, and without having expressed an opinion that the statement is true. The wrongful repetition gives it that much greater weight. "Tale bearers are as bad as tale makers."

(2) *Publication.*—The defamatory words must have been published, before an injury can be held to have resulted. Publication is made when the idea is communicated to another. To dictate a libelous letter to a stenographer is regarded as a communication, whether the letter is mailed or not.

Certain communications are considered privileged, when made in good faith. The report of a banker concerning the financial standing of a customer, or the report of an employer relative to an employee seeking employment elsewhere would be a privileged communication.

Plaintiff A and defendant B were rival undertakers in a small town. The defendant printed and sent to X, whose wife was seriously ill at the time, a small card reading as follows: "Bear in mind our undertaking establishment. Satisfaction guaranteed. (Signed) 'Plaintiff A.'" Defendant presumably sent the card to injure plaintiff. The court held that the plaintiff was injured, and that the defendant was liable for damages. (159 N. W. 569).

§ 327. **Assault and battery.**—An assault is when one threatens an unpermitted contact with the body of another. The threat must be coupled with a reasonably apparent ability to carry it into execution. It is not an assault for X to in-

form Y over the telephone that he intends to shoot him on sight.

Assault is generally coupled with battery. They usually go together. A battery is the unlawful touching of the person of another by the aggressor. The wilful touching, however light, is a battery, so sacred is regarded the person in law. An injury done to another in anger, or in spiteful, rude, insolent manner, violently jostling, or throwing water on him, is a battery in the eyes of the law.

An assault and battery in some instances is lawful. A parent has the right to punish his own child; a schoolmaster has the right to punish a pupil for misbehavior. The punishment must be reasonable, and not with the intent of gratifying ill-will or malice. So also, one may defend himself, or his family, from an assault; protect the unlawful taking of his property; or eject an intruder or trespasser from his premises.

§ 328. **Trespass.**—In its widest sense, a trespass signifies any transgression or offense against the law of society, or of the country in which we live, whether relating to a man's person or property. Any interference, however slight, which unlawfully disturbs a party in the possession of his property is a trespass, as placing rubbish on a neighbor's land, breaking a blade of grass, or flying a kite over another's land. If a person commits a trespass against the person or property of another under a mistake, honestly made, he is nevertheless guilty of a trespass and is liable to the injured party for damages.

A man's house cannot be entered forcibly for the execution of a civil process, but it may be so entered for the purpose of executing a criminal process. A trespass may be committed by one who enters upon the land or premises of another lawfully, but while on another's property does some unlawful act. When a highway is blocked by reason of some sudden or unexpected obstruction, the public have the right to pass over the adjoining property to get around the obstruction—without being guilty of trespass.

Everything which the law recognizes as property may be made the subject of a trespass. It is not necessary for the owner to show special damages in order to maintain an action

of trespass. Ordinarily, the measure of damages is the actual value of the property destroyed. Damages are awarded as compensation to the injured person for the damages done. The spirit which actuates the party in committing the trespass enters into the question as to the amount of damages. If no perceptible injury has been done as the result of the trespass, the mere fact of the trespass entitles him to a verdict for nominal damages only. A person trespassing after notice or a warning not to do so aggravates the offense and justifies damages as a penalty.

§ 329. **Negligence.**—The omission or failure to do, or to forebear doing, that which a reasonable and prudent person would do under the circumstances, constitutes negligence. It is absence of care according to the circumstances of the particular situation involved. When an injury results to another through a failure of care, the negligent party will be liable in damages, and may also be criminally liable.

To maintain an action for damages resulting from negligence there must be,

(1) An injury to some person, property, or rights.

(2) The injury must be due to want of ordinary care on the part of the negligent party, or his employees or agents acting as such.

(3) The injury must not be due in any substantial degree to a want of ordinary care on the part of the one damaged or hurt, or of his employees or agents acting as such. In other words, the complaining party must be free from fault, the defending party must have been at fault.

When one brings an action against another for damages resulting from an injury, he must first show the existence of the duty which he contends has not been performed, he must show a failure to observe the duty, and that the one bringing the action did not contribute, through his own negligence, to the cause of the injury.

§ 330. **Deceit.**[1]—A fraudulent misrepresentation by which one person deceives another, who has no means of detecting

[1] For a discussion of fraud see § 23-2.

the fraud, and which deception results in damage or injury to the latter is, in law, termed deceit. The injured party may bring an action for damages.

The fraudulent misrepresentation which deceives another is a tort. In order to recover in an action of deceit it is necessary to show that:

(1) The defendant made a false representation of a fact.
(2) It was a material fact.
(3) It was made with a knowledge of its falsity.
(4) It was made with the intention that the other would act thereon.
(5) The person deceived had a right to rely on it.
(6) He actually relied upon it.
(7) It was acted upon to the plaintiff's damage.

§ 331. **Food and Drug Act.**—The improper labeling or marketing of goods is a fraud. A purchaser has the right to rely on the correctness of labeling of merchandise offered for sale. In June, 1906, Congress enacted a statute known as the Food and Drug Act "for preventing the manufacture, sale, transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein." This act is intended to serve one or both of two purposes: to preserve the public health, and to prevent deception.

§ 332. **Conversion.**—It frequently happens in the business world that someone will use, carry away, destroy, or injure the property of another, thus causing considerable annoyance as well as pecuniary loss. The law of torts provides a remedy in that he who converts the property of another to his own use is liable to the injured party for its value.

The essential element of conversion is that one exercises dominion over the property of another. A thief obviously converts the goods of the owner when he steals them. Conversion does not depend, however, upon the intent to do a wrongful act. An innocent person may be guilty thereof, although acting in the utmost good faith.

The purchaser of an automobile from a thief who has stolen it is guilty of converting the property, and is liable to

the owner for its value. This is also true where one sells the car of another under the belief that he is selling his own machine.

A bailee who wrongfully refuses to return bailed goods to the bailor is guilty of conversion. As the bailee has the property rightfully in his possession, there usually must be a demand by the bailor and a refusal to redeliver the goods. Where the bailee sells or destroys the goods, a demand and refusal is unnecessary. A bailee who holds goods for one who has stolen them, and upon demand returns the property in good faith to the thief, is not guilty of conversion, because he has not exercised dominion over the goods.

§ 333. **Procuring a breach of contract.**—A third party may become personally liable for damages by inducing another to break his agreement, or by using unlawful means to prevent one from forming a contract. Hence, a person who knowingly persuades or entices another to leave the employ of one in whose service he is employed, or who prevents a person from entering the employment of another by threats or intimidation, is liable for damages to the one wrongfully injured.

The plaintiff, W. H. Goode, engaged a musical artist to sing at his theater for a season. The defendant Keel induced the musician to break the contract. Keel was held liable for damages to Goode for inducing the musician's breach of contract.

QUESTIONS FOR DISCUSSION

(Oral)

1. Anderson agrees to build a motor truck for Gilbert, "which shall be so constructed that it will carry 10,000 pounds." Shortly after it was completed Gilbert loaded it with window glass weighing three tons. The truck gave way under this load and the glass was broken, causing Gilbert a loss of $500. Upon what will Gilbert base his right for damages against Anderson?

2. Due to the negligent operation of his automobile, Smart crashed into the car of Finn, which was properly parked along the curb. Is Smart under obligation to Finn for damages?

3. While his country was at war, A exchanged secret communications with the enemy, which led to the capture of a fort. Is this a tort?

4. A, standing at the entrance of the village postoffice shouted at B, "No wonder your business is going to the rocks; any business would with such questionable practices as you employ." This was said within the hearing of the postmaster, the butcher, the constable, and Mrs. Gossip. What remedy has A against B?

5. Suppose A had expressed himself in the same manner to B at five o'clock in the morning, while the rest of the inhabitants were still asleep. Would such an accusation justify B in assaulting A?

6. Y writes, "Mrs. Gossip says Z stole the goods." If Z did not steal the goods, against whom can he proceed for slander?

7. C was acting as chairman of a parish meeting. After a motion had been made to expel Doe from the room, Doe said that before he would be expelled he would pull the chairman out of the chair. He advanced toward the chairman with his fist clinched, but was stopped by other members present. Has Doe committed a tort?

8. Defendants interfered with and injured Cring's business by threats against his workmen, and all persons who came into his place of business. Cring's business was seriously injured. Has Cring a right against defendant?

9. Mrs. Bennett, carrying a large market basket, was crossing a street. Exercising due care, she nevertheless slipped and fell. She was struck by Doe's car before she could get up. Doe saw her fall and applied his brakes but due to the defective condition of the brakes he could not stop the car in time. Can Mrs. Bennett recover damages from Doe?

10. After his day's work at a factory, Sterling took a "short cut" home and walked down the track of a railroad company. A train driven by an engineer, who at the time of the accident was reading a paper, struck Sterling and killed him. Is the railroad company liable? Is the engineer liable?

CASE PROBLEMS
(Written or Oral)

No. 281

Plaintiff was sleeping out in the sunshine. With the aid of a powerful magnifying glass defendant, as a practical joke, focused the sun's rays on the plaintiff's body. This "practical joke" caused plaintiff much discomfort for several days. Can he recover from defendant? (29 Ind. App. 273.)

No. 282

A public speaker, by mistake, handed a news reporter speech number two instead of number one. Number one was the speech delivered. No part of number two, which contained a libel on Mr. X, was used. The speaker said he had intended to destroy number two. By mistake, however, this defamatory speech appeared in the newspaper. Who, if anybody, is liable? (111 Iowa 490.)

No. 283

A real estate salesman who had just returned from Florida was offering for sale a lot. He said the lot was so advantageously located that it was safely worth $50,000. Browning bought the lot for the price asked, and went down to Florida the following winter to see his property. He found his lot to be in the outskirts of the city, and of comparatively little value. May he sue the salesman for deceit? (153 N. Y. 593.)

No. 284

Roe owed Doe a sum of money. Roe entered the latter's place of business for the purpose of tendering the amount due. Was this a trespass?

No. 285

Kane was cutting down trees on his own land. One of the trees, contrary to Kane's intention, fell upon the adjoining land of Blank. Was this a trespass to Blank's land? (89 N. Y. 498.)

No. 286

On a calm morning, a farmer lighted a fire in his inclosed field, but the wind presently changed and a whirlwind, carrying the fire beyond his control, destroyed his neighbor's property. Can the neighbor recover damages? (19 Johns 381.)

Chapter LIII

TORTS—AUTOMOBILES

Keep in mind these questions when studying this chapter:

1. **What is the legal status of the automobile?**
2. **Under what legal duty is the driver of an automobile?**
3. **Is the owner of a car liable for the negligence of his chauffeur?**
4. **What is the liability of the owner to those riding as guests?**

§ 334. **Introduction.**—The driver of an automobile is obliged to exercise reasonable care and caution for the safety of others. Each particular situation requires consideration in accordance with the risk involved. The legal liability of the owner of a motor vehicle to pedestrians, to those riding as invited guests, and for the acts of those operating the machine for the use and benefit of the owner are important topics to be considered under the law of negligence.

§ 335. **Legal status.**—The automobile, in the eyes of the law, is not of itself considered a "dangerous instrumentality." While the public, in a general way have that belief, it is not the view the courts have adopted. As long ago as 1907 the Supreme Court of Indiana said:

"There is nothing dangerous in the use of an automobile in the hands of an intelligent and prudent driver. Its guidance, its speed, and its noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless . . . on the road as other vehicles in common use. It is the manner of driving that constitutes a menace to public safety." (165 Ind. 465.)

In the same year, in another jurisdiction, Judge Powell of the Georgia Court of Appeals, in summing up this same point said, with rare judicial humor:

"It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. . . . We have found that there are times when these machines not only lack ferocity,

but assume such an indisposition to go that it takes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules and the like." (2 Ga. App. 50.)

§ 336. **Duty of the driver.**—The driver of an automobile has no greater rights in the streets than a pedestrian. They have equal rights. Hence, it is the duty of the operator to keep his car under control at all times. He must slow down at crossings, and observe the rules of the road. Blowing a horn will not suffice as an excuse if the circumstances require slowing down, or even stopping the machine entirely.

In many states, statutes have been enacted which provide that a speed of more than a named rate shall be considered *prima facie* evidence of failure to use due care—if an injury has resulted to someone other than the driver. In the absence of such regulations, the test of liability is well expressed in a New York decision wherein it was said:

"No matter how great the speed may be which the law permits, the motorist still remains bound to anticipate that he may meet persons at any point in a public street, and he must keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. The true test is that he must use all care and caution which a careful and prudent man would exercise under the circumstances." (188 N. Y. 131.)

§ 337. **Criminal negligence.**—The driver of an automobile is held to a strict accountability if he attempts to drive away from the scene of an accident to which he has contributed. The increase of motor traffic has led to the enactment of laws designed to protect the public by requiring the one who caused the injury to disclose his identity, and render aid to relieve suffering or lessen the result of the injury. This information must be given to the one whose person or property has been injured, if reasonably possible, otherwise to someone in their interest, or to a public officer or other person at or near the place at the time the accident occurred. The operator need not state the circumstance of the occurrence tending to show his responsibility but merely to identify himself. Giving the

number of his car is not sufficient since the driver of the car may not be the owner of it.

§ 338. **Injuries to guests.**—The legal duty which the driver of an automobile owes to a guest riding with him is a question of frequent occurrence. The courts quite generally agree that the driver is liable for injuries sustained by a guest because of the driver's negligence. The guest, however, must not be guilty of contributory negligence. The guest is guilty of contributory negligence through a failure in not warning or remonstrating, or in not leaving the car if practical, in the event the driver was speeding dangerously, or if the guest knew of danger unknown to the driver.

The driver must exercise reasonable and ordinary care. In those jurisdictions which recognize degrees of negligence, it may be held that the driver with a gratuitous passenger is liable only in a case of gross negligence.

An action was brought against a motorist, for the death of the intestate who was killed while riding with the defendant as his guest. The defendant negligently allowed his car to run off an embankment causing the death complained of. The court held that, in the absence of contributory negligence on the part of the guest, the defendant was liable. His liability is not lessened by the fact that the decedent was a guest, or a gratuitous passenger. (198 Ala. 658.)

In another case, the plaintiff was riding with the defendant by invitation and the plaintiff brought suit to recover damages for injuries sustained. The accident occurred when the automobile driven by the defendant skidded off the roadway, turned over and crushed the plaintiff under the steering wheel, breaking her collar-bone and inflicting other injuries. The plaintiff was awarded judgment. The court ruled that the driver must use reasonable and ordinary care. (200 Pac. 41.)

Suppose the owner did not expressly invite the "guest" to ride but knew he was there. Can the owner be held for the driver's negligence if injuries result to the trespasser? In 73 Southern Reporter 955, the Court held: "The owner is not relieved from liability because he did not expressly invite the guest. If his presence was known and acceded to by the owner, he is liable."

§ 339. **Liability of owner.**—It is a well known principle of law that the owner of a motor vehicle is liable for the negligence of his chauffeur, or driver, while acting within the general scope of his employment. The general liabilities created by the relationship of master and servant apply to the owners of cars and their employees. If a chauffeur is operating his employer's machine solely for his own private business, the

chauffeur and not the owner would be liable. It has been held that when a chauffeur goes for a "joy-ride" in his employer's car, the employer is not liable for the damage the chauffeur may cause.

Members of the family of the owner of the car, operating it for the general family purposes, are considered as agents of the owner at the time. It has been held that the son is the agent of the father where the father bought a car and authorized his son to drive it. In such an event, the father would be liable for the negligent acts of his son. However, the mere fact of relationship of parent and child will not cause the parent to be responsible for the negligence of the son. To hold the father liable, there must be established the relationship of master and servant. While the father may be better able to pay for harm caused by the son, it is a well settled principle that the father is not liable for the torts of his minor child.

QUESTIONS FOR DISCUSSION
(Oral)

1. If someone asks you for permission to ride in your car, who assumes the risk of the car and its operation? Would your answer be the same if the driver were operating the car in a careless or negligent manner?

2. When a hired chauffeur takes his master's car for a "joy-ride" and negligently causes an injury or damages to another, to what extent is the owner of the car liable? Would your answer be the same if the chauffeur takes the car with the consent of the owner?

3. Will the law assume that when a son uses his father's car for taking the family for a drive, the son is acting as the father's agent, thus causing the father to be liable for damages the son may have caused? Suppose the son takes the car for a frolic of his own without his father's knowledge or consent, then who is liable for damages? Does it make any difference whether the son is of legal age or not?

4. What degree of care is exacted of one who hires a car

from another. If the car is stolen or is injured through no fault of the bailee, to whom must the owner look for the loss?

5. When one hires a car to do some specific act, or to use for a definite length of time, and uses it for a different purpose or for a longer time, how does that affect the bailee's liability if the car is stolen or injured through the fault of another?

6. When the owner of a car is riding with his chauffeur, and the chauffeur violates a specific order of the owner, thus causing damages or injury to another, to whom may the injured person look for damages?

7. To what extent does the driver of an automobile have a superior right to the use of a highway over that of a driver of a team of horses, or of a footman? Does the "law of the road" require that pedestrians shall pass on a certain side?

8. Just what do you understand is meant by the expression "Law of the road"? Name several requirements that you think come under this law.

9. When a car is left in the custody of a garage keeper for storage or repairs, and the garage keeper or his servant negligently runs the car so as to cause injury to another, who is liable for the damages thus caused?

10. When a car is left with a garage keeper for storage, to what extent is he responsible for its safe-keeping?

11. In driving a car through an alley, Daniels struck a fence and tore a part of it down. The fence extended out into the alley farther than the land of the owner and it was due to this projection that it was struck. Will Daniels be liable for the cost of damage done to the fence?

Chapter LIV

BUSINESS CRIMES

General Principles

Keep in mind these questions when studying this chapter:

1. **Is there a distinction between a public and a private wrong?**
2. **Into what two general classes are crimes divided?**
3. **How does capacity differ in committing crimes and making contracts?**
4. **Why are criminals punished?**
5. **What are some of the important business criminal offenses?**

§ 340. **Public wrongs.**—Every person is bound by certain obligations to his fellow man, not only as an individual, but as a member of the community, the state, or the government; and an omission of a duty commanded, or the commission of an act forbidden by a public law, subjects the offender to what is termed a criminal prosecution. Criminal law is that portion of the law which has to do with crimes. A crime, according to Blackstone, is an act, committed or omitted, in violation of a public law either forbidding or commanding it. A crime is a wrong done to the public, of such a character that the state will prosecute and punish the offender.

§ 341. **Classification of crimes.**—Crimes are divided into two general classes, namely:

(1) Felonies.
(2) Misdemeanors.

(1) *Felony.*—A felony, under the statutes of most states, is an offense for which the offender, on conviction, shall be liable to be punished with death, or imprisonment in the penitentiary. Generally speaking, felonies are the more serious crimes. The statutes usually define what acts constitute a felony.

(2) *Misdemeanors.*—The term misdemeanor is applied to offenses of a trivial character, punishable by a fine only, or by imprisonment in a county jail, or both. Misdemeanors are

lesser crimes. The statutes usually define what acts constitute a misdemeanor.

§ 342. **Principals and accessories.**—When several persons participate in the commission of a crime, all are criminally liable, although some may have aided only by advice, or been present and coached. It is not necessary that one actually commit the criminal act to be guilty thereof as the actor. One who advises or procures another to commit a crime is the principal whether present or absent when the crime is committed, and is responsible for the act.

An accessory is one who is not the chief actor in committing the offense, nor necessarily present in person at its performance, but who is in some way concerned therein, whether before or after the act was committed. Consequently, there is a criminal liability in either event.

§ 343. **Capacity of parties.**—No one can be held responsible for a crime unless he has sufficient capacity, mental or otherwise, to commit it. One test of responsibility is the ability of the offender to distinguish between what is right and what is wrong. An infant under the age of seven is presumed to be incapable of having a criminal intent. Between the ages of seven and fourteen, the presumption is in favor of his incapacity, but this presumption may be removed by evidence to the contrary. After the age of fourteen, he is considered in law the same as an adult so far as criminal intent is concerned.

§ 344. **Punishment.**—A civil action is for the purpose of obtaining redress for a private injury. A criminal prosecution is to punish the accused in order that he may be an example to deter others who may be tempted, from offending in a like manner, or to protect the public by depriving the wrongdoer of the power to do future mischief, and also, if possible, to reform the offender.

As soon as a crime is committed an injury has been done to the state, and it is the state's right and duty to prosecute the guilty offender and punish him for his act. The person particularly injured has no control over the criminal proceedings, and no settlement between him and the wrongdoer can take away the state's right to punish the offense. In fact, if

a person attempts to settle, for a consideration, with one who has committed a felony, he is himself guilty of a crime termed *compounding a felony*. And, if one attempts to extort money or property from another, by means of intimidation, as a reward for refraining from prosecution for a felony or public accusation, he is guilty of *blackmail*.

§ 345. **Criminal conspiracy.**—An agreement between two or more persons to commit a crime is a conspiracy. It has been said that a conspiracy is an agreement to do an unlawful act by lawful means, or a lawful act by unlawful means. Under certain conditions an agreement may be a conspiracy, even though the act agreed to be done is not a crime, or an act publicly injurious, but merely a civil wrong, as for instance, to manufacture a spurious article to sell as genuine; to obtain a monopoly to raise the price of a commodity so as to compel the consumer to purchase it at an exorbitant price.

Any joint effort to purchase goods upon the impression of solvency with no expectation of paying for them; or any understanding by two or more persons to dispose of goods in contemplation of bankruptcy, is punishable as conspiracy. It is a conspiracy to injure a man, or his trade, or his profession.

Men may lawfully combine for the purpose of dictating their own wages, choosing their own employers, and to serve according to the dictates of their own conscience. To this end there is nothing unlawful in a strike to compel employers to comply with their demands and desires. When on a strike, it is lawful for them to induce other workmen to join with them. But they must abstain from violence.

On the other hand, it is unlawful for employers to coerce or intimidate wrongfully their workmen in the disposal of their talents. Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others, and if several combine to coerce his choice, it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation.

§ 346. **Arson.**—At common law, arson consisted in the wilful malicious burning of the house of another by day or by night. Anciently it was regarded as a heinous felony and punished with death. Statutes have extended the offense to

various other burnings than those originally included, so that any permanent place of residence is a house within the meaning of the law. It is arson to set fire to a jail, asylum, or other edifice occupied by persons lodging therein. Likewise, one may be guilty of the crime of arson if he burns any shop, office, store, depot, boat, etc., regardless of whether the same is occupied or not, or any goods or chattel, which are insured, regardless of the owner of them.

The crime is complete as soon as any part of the structure, however trivial, be burnt; if a shingle is consumed, or charred, though the fire afterwards be extinguished it is sufficient. If the building is merely filled with smoke and the wall blackened, arson has not been committed.

§ 347. **Larceny.**—Larceny is the wrongful or fraudulent taking and carrying away of the personal property of another with the intent to convert it to the taker's own use, and to make it his property without the consent of the owner. Abandoned property cannot be stolen, because there is no owner. Formerly, deeds, bonds, mortgages, notes, and the like were not held to be property, but evidence of title or indebtedness.

Ordinarily, to constitute the crime of larceny, the possession of another's property must be obtained unlawfully, that is, against the will or consent of another. Therefore, it is larceny for one to insert a metal disc in an automatic vending machine for the purpose of obtaining something of value which the owner intended to part with only to the one who placed a coin in the machine.

If one enters a store for the apparent purpose of buying goods, and they are delivered to him to examine, and he carries them away without paying for them, the taking is larceny. Also, if one agrees to purchase gas at so much per thousand feet, and the company install a meter to measure the gas used and the defendant makes a secret connection between his pipe and that of the company's main, such conversion will be larceny.

If the owner of property places the same in the possession of another, as a tailor or blacksmith, who thus acquires an interest in the goods for the service done, or if he deposits his

watch as security for a board bill, the owner will be guilty of larceny if he fraudulently takes his own property from such a bailee without the latter's consent and without paying for the services received.

§ 348. **Cheats and frauds.**—The laws of most states provide, that every person who knowingly and designedly obtains from any person, money, goods, wares, or merchandise, with the intent to cheat or defraud another, and who shall, in pursuance of such intent to cheat or defraud, after obtaining possession of any such property, sell, transfer, secrete, or dispose of the same before paying or satisfying the owner, shall be punished in the same manner and to the same extent as for the feloniously stealing of money, property, or thing so obtained.

§ 349. **Embezzlement.**—Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or in whose hands it has lawfully come, as of an employer's money by his clerk, or of public funds by an officer having them in charge.

Embezzlement differs from larceny in that the original taking of the property was lawful or with the consent of the owner, whereas in larceny the thief obtains the goods by stealth, or without holding a position of trust. In embezzlement, the wrongdoer fraudulently converts the property of another, which he has obtained by virtue of some fiduciary relation, to his own use. There must be a relation of confidence and trust, and the appropriation must be with a fraudulent intent.

If a clerk, or servant, or agent has possession of the goods or money which he wrongfully converts to his own use, the offense is embezzlement. But if he puts the money in the safe and afterwards takes it, he is guilty of larceny, for the money is then in the possession of the master. The distinction is between custody and possession. A servant who receives goods or money from his master for a specific purpose has the custody of them while the possession is in the master.

§ 350. **Forgery.**—The false and fraudulent making, marking, or altering of an instrument which would, if genuine, ap-

parently impose a legal liability on another, or change his legal liability, is termed forgery. The making or alteration of any material part is sufficient to constitute such a crime. It is forgery to write a promissory note above the signature of another upon a blank piece of paper, without authority from the latter; or to make, alter, or erase figures so as to change the amount of a note or the date of its payment. It is forgery for a bookkeeper to enter one sum, when directed by his employer to enter another amount, and the false entry is made with intent to defraud.

To be forgery, the instrument must purport to be what it is not; to be the writing of one man when it is the writing of another. One signing an assumed or fictitious name is not guilty of a forgery if there is no attempt to commit a wrong on a third person. If the purpose is to acquire goods or money and avoid discovery of his identity, then he is guilty of a forgery.

"Where one of two persons of the same name signs his own name, with the intention that it is to be used as the name of another, he commits a forgery, as, where one of the same name obtains possession of a check or note payable to another, and indorses it, knowing that he is not the person to whom it is payable." (76 Ga. 788.)

§ 351. **Sherman Anti-Trust Act.**—Federal legislation has been directed against combinations in restraint of trade. In 1890 Congress passed an act known as the Sherman Anti-Trust Act. The purpose of this law is to prevent the formation and operation of trade monopolies. In this connection, labor is not considered a commodity.

In 1914 the Clayton Act was passed by Congress. The purpose of this act is to do away with the unfair practices large corporations were resorting to in order to avoid provisions of the Sherman law. In the same year the Federal Trade Commission Act was made a law. This law created a commission whose duty it is to see that the anti-monopoly laws are not violated; and that the decisions of the courts pertaining to monopolies are carried out. It also has the power to investigate the business practices of corporations.

Under the Sherman Act and other anti-monopoly laws the following acts are considered illegal:

(1) Agreements to fix prices.

(2) Agreements to limit output.
(3) Agreements to divide.
  (a) Territory.
  (b) Earnings or profits.
(4) Agreements for "cornering" any commodity.
(5) Agreements to fix resale prices.

QUESTIONS FOR DISCUSSION
(Oral)

1. X set fire to Smart's building, causing the owner damages amounting to $5,000. Smart brings a suit against X for the injury suffered. What kind of an offense is this?

2. X stole an automobile from Y. Y sued X and recovered the value of the automobile. Later X was prosecuted by an officer for larceny. Is Y's recovery of the car a bar to the conviction of X for the theft? (65 S. C. 161.)

3. A is caught speeding, by an officer of the law. The judge assessed a fine of five dollars and costs. Classify this crime.

4. (a) How is embezzlement distinguished from larceny?
  (b) What is the difference between a felony and a misdemeanor?

5. An eight-year-old boy was charged with having struck the deceased over the head with a baseball bat. The boy did this in a spirit of anger when the man made an effort to stop the game in which the boy was playing. Can the boy be punished criminally?

6. X, Y, and Z planned to rob a United States mint. X, who had been a former employee of the mint, furnished a layout of the mint. Y furnished the guns, tools, and dynamite; and Z furnished the automobile. Just as the latter was cranking his car to make ready for the burglary, the trio were caught by an officer. Did their acts constitute a crime?

7. A intentionally set fire to a haystack. Is this arson?

8. J had been indicted for attempting to purchase twenty yards of cloth which he thought were stolen. The goods had lost their character as stolen goods at the time J tried to buy them. Is he guilty of any offense? (185 N. Y. 497.)

9. D placed a lighted candle on the shelf in K's store, intending to destroy the building. He returned and removed the candle before any damage was done. Is he guilty of arson?

10. Blank stored a bicycle in the Acme warehouse and paid the required charges. Thereafter Blank secretly entered the warehouse and removed his bicycle, intending thereby to hold the warehouseman liable for its loss. Can Blank be criminally prosecuted for taking his own property?

CASE PROBLEMS
(Written or Oral)

No. 287

In 147 Ind. 215, D, who had committed an embezzlement, tendered back the money embezzled before the filing of the affidavit and information charging the offense. May he, nevertheless, be prosecuted and convicted?

No. 288

In Regina v. Class, B. C. C. 460, the prisoner was tried for the forgery of a copy of a painting on which he painted the signature "John Linnell." This was intended to be an imitation of the signature of the original artist. Was this a forgery?

No. 289

It is desired to form a holding company for the purpose of buying and controlling the stocks of two competing railways. Would this violate the provisions of the Sherman Act? (193 U. S. 197.)

Chapter LV

THE HISTORY OF A LAWSUIT

Keep in mind these questions when studying this chapter:

1. **What is the purpose of a lawsuit?**
2. **How many parties are there to an action?**
3. **What is meant by the jurisdiction of a court?**
4. **How are the parties to an action brought into court?**
5. **What is a pleading, and its purpose?**

§ 352. **The purpose of law.**—The law is a form of social control. It is a means employed to make possible the living and working together of large groups. For this purpose, courts are necessary. The rights and obligations of a civilized people are decided by institutions known as courts. Whenever a legal right is invaded, the injured party may appeal to the courts for an adjustment of his rights.

Since the procedure in a court is somewhat technical and unfamiliar to most persons, it is necessary to employ those who have the necessary qualifications, to represent and act for parties to litigation. The different states have made provision for licensing persons "learned in the law" to practice in the courts. They are known by different terms as, lawyers, attorneys, counselors, or solicitors.

§ 353. **The case of Brown vs. Foster.**—It appears that there was an agreement between the plaintiff Brown, and the defendant Foster, that the former was to make and deliver to the latter, upon a certain day, a suit of clothes, which, according to the terms of the contract, was to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept them and promptly returned them to the plaintiff. Thereupon the plaintiff, believing he had a just cause of action, employed the services of a lawyer to bring a suit to secure compensation for valuable service, and for materials furnished the defendant, who, as

the plaintiff believed, unreasonably refused through caprice, to accept and pay for the articles.

§ 354. **An action or suit.**—When a person seeks the relief afforded by a court, the machinery of the law is set in motion by bringing an action or suit. An action is defined as the legal proceeding by which one demands or enforces one's rights in a court of law. A civil suit is the prosecution of a demand by a person, either natural or artificial (as a corporation), against another, to enforce a right, to prevent a wrong, or to recover a claim, while a criminal action is a prosecution by the state against the one who has committed a public offense known as a crime. A remedy in a civil suit is the means by which the person instigating the suit secures the enforcement of his rights. It is a well known maxim of law that there can be no legal wrong without a legal remedy.

§ 355. **Parties to an action.**—In an action there are two parties. In this respect an action at law is similar to a contract. Each of these parties may consist of one or more persons. The one who institutes the action is known as the plaintiff, the one against whom it is brought is the defendant. In a criminal prosecution the state is the plaintiff; the one accused of the crime is the defendant. The one who brings an action in a civil suit must be competent to contract. An incompetent person, as a minor, is permitted to bring a suit in the name of someone appointed for that purpose, who is known as a guardian.

§ 356. **Jurisdiction.**—Courts vary in power and authority, from those of justices of the peace, having jurisdiction in the most petty and trivial cases, to the Supreme Court of the United States, the most powerful tribunal in the land. The term jurisdiction means the lawful right or power of a court to hear controversies and determine rights between parties, and to carry the judgment rendered into effect. Jurisdiction is defined by law. Over matters outside of its jurisdiction, a court has no control, and any acts in reference to such matters would be void.

Jurisdiction is either original or appellate. Original jurisdiction is the authority to hear the case in the first instance;

while appellate jurisdiction is the right to review and correct the actions of an inferior court. To some courts are intrusted controversies concerning crimes, while another court may be devoted entirely to the administration of the estates of deceased persons; to others is assigned litigation involving property within a given territory. It is, therefore, highly essential in bringing a suit that it be brought in a court having the proper jurisdiction. The lawyer for the plaintiff, believing his client has a just cause of action, next must determine what court has proper jurisdiction.

§ 357. **The summons.**—An action is usually commenced by the issuance of a summons, in some states called a process. With the summons may be served a complaint, sometimes called a bill of complaint. The service of the complaint with the summons usually shortens the time for the defendant to plead.

The summons is a formal notice to the defendant to appear before the court and defend the action. The defendant is bound by what the court does, in a case to which he is a party, only in the event that he has been properly notified of the proceedings. Knowledge of the filing of a suit is not enough to bring a party into court. Until a summons is served the court does not have jurisdiction of the person of the defendant, and any judgment against him would be void. The summons must contain the names of the parties to the suit, the nature of the claim, the amount sued for—if a money demand is involved—and an order to appear at a designated time and place, prepared to answer the charges or complaint.

(1) *Service of summons.*—The summons is served in different ways in the various states. In some jurisdictions it is issued by the judge, or clerk of the court, and is served by an officer of the court, while in other states it may be issued by the lawyer for the plaintiff, and be served by someone over the age of eighteen. It must be served upon the defendant in such a manner as to let the person served know what it is. If improperly served, the summons will be void, and the court will have no jurisdiction.

If the defendant has been properly served, and fails to

appear at the appointed time and place, either in person or by attorney, the court usually gives judgment by default against the defendant.

§ 358. **Pleadings.**—After an action has been started by the service of a summons, the case is brought before the court by a series of pleadings. Pleadings consist of the formal statements of the parties, made in writing before the beginning of a trial. Their purpose is to inform the court and each other of their respective versions of the matter in controversy upon which they rely. This is necessary in order to save time by reducing their dispute to certain specific issues.

(1) *Declaration.*—The statement of the plaintiff's cause of action is called a declaration or narration. When the plaintiff has filed his complaint, the defendant must answer thereto or lose the case by default. The answer to the declaration may be by demurrer, or by plea.

(2) *Demurrer and plea.*—A demurrer is an admission of the facts alleged, and a denial that they constitute a cause of action. A plea denies the facts alleged, or offers other facts in excuse.

In the case of Brown vs. Foster the parties may not agree that there was a contract at all. Or they may disagree as to the time of performance, or as to the amount paid or to be paid. They may further disagree as to the quality of the material used, or whether it conformed to the specifications as to the style in which the suit was to be made. Hence, the lawyer for the plaintiff would write out in a formal and concise manner his complaint, file a copy with the clerk of the court, and furnish a copy to the defendant.

The defendant's answer may deny any legal liability, or he may claim there was no contract at all, due to a failure to name a specified price for the finished product. He may contend that he was under age at the time the agreement was made. The defendant may claim that the plaintiff made false representations as to the quality of the material to be used, or give other specific reasons why he should be exempt from liability. The answer is filed with the clerk of the court, and a copy furnished to the plaintiff.

QUESTIONS FOR DISCUSSION
(Oral)

1. The case of Brown versus Foster is listed on the court docket. Does it necessarily follow that Brown and Foster are personal enemies?

2. Serls sold Johnson a used wagon. Nothing was said at the time as to the price. Serls honestly believes that the wagon is worth not a cent less than $75. Johnson is sincere in his belief that the wagon is worth only $50. Where is there an "impartial agency" that will determine the price of the wagon?

3. Doe maliciously sets fire to Roe's house. How many parties are interested in this case? Is it possible that Doe may be defendant in two different trials for this offense?

4. G——, who has been indicted for stealing an automobile in Toledo, Ohio, was arrested and tried for this offense in Florida. The evidence clearly shows that G—— is guilty. Will his conviction by the Florida court stand?

5. "A case is brought before the court by a series of pleadings." Just what is the chief purpose of "pleadings"?

6. Why is it that for stealing an automobile a man is sometimes tried in a federal court, but for robbing a store he is tried in the state courts?

7. If a man who lives in Ohio is temporarily in Colorado and is regularly served with a summons to appear in a damage case brought against him, does the Colorado court have the right to hear the case?

Chapter LVI

COURTS

Keep in mind these questions when studying this chapter:

1. **What is a court?**
2. **What are the functions of a court?**
3. **How are courts classified as to their jurisdiction?**
4. **Who are the officers of a court, and what are their duties?**

§ 359. **Courts.**—Courts are established to compel men to perform their obligations. The word court is from the Latin *cohors,* an inclosure. The idea of place, from which the term is derived, is reminiscent of the time when justice sat in the open courtyard. This derivation has given prominence to the definition of a court as "A place where justice is judicially administered." The original meaning of the term court is "King's Palace."

A court is more than a place; it is also a tribunal established for the decision of controversies affecting legal rights and for the prevention, redress, or punishment of legal wrongs; it consists of one or more judges, together with such other officers, as clerks, sheriffs, jurors, and the like, necessary for the transaction of its business according to law.

§ 360. **Officials; their duties.**—(1) *Judges.*—A judge is a public officer who presides in a court. It is the duty of the judge to preside over and direct the proceedings of the court, and to decide all questions of law arising during the course of such proceedings. Judges are appointed or elected in various ways in different states. In the Federal courts they are appointed by the President of the United States, with the approval of the Senate.

(2) *Lawyers.*—Lawyers are persons skilled in the law. They are officers of the court. Their business is to carry on the practical and formal duties pertaining to the matter for

which they are engaged. It is their obligation to manage the business of their clients with care, skill, and integrity.

(3) *Clerk.*—It is the duty of the clerk to make and keep true and complete records of the proceedings of the court, administer oaths, receive money, and perform much of the ordinary routine business of the court. In general, they are required to attend to the ministerial duties of the court.

(4) *Sheriff.*—The office of sheriff is of great antiquity. His duties in this country are to open and close court, enforce order therein, manage the county jail, have charge of juries, and serve writs, warrants, and other mandatory orders. A sheriff is a ministerial, not a judicial officer. He is the chief peace executive officer of a county.

§ 361. **Courts of record.**—Courts are classified as courts of record and those not of record. A court of record is one whose acts, proceedings, and decrees are enrolled and received in other courts as conclusive evidence of the facts therein contained. The keeping of a record of the proceedings of the court does not necessarily make it a court of record, as courts not of record keep minutes of their proceedings. Most of the judicial courts of the United States are courts of record. The Constitution provides that "full faith and credit shall be given in each state . . . to the judicial proceedings of every other state." These records are also received, through international courtesy, as evidence in the courts of other countries, and their proceedings are likewise received here.

§ 362. **Federal courts.**—The courts in this country are divisible into two groups: (1) federal courts, and (2) state courts. The federal courts are instituted by the Constitution and acts of Congress, and they administer justice in the name and under the authority of the United States. Their jurisdiction is limited, and is defined by the authority creating them.

§ 363. **The Supreme Court.**—The Federal Constitution provides that the "judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Con-

gress shall from time to time ordain and establish." The Supreme Court is the most responsible body in the land, because its decisions are final in respect to the powers of the government and the rights of the people, established by the Constitution. These decisions being the last word, they determine the law—and must be obeyed.

The court consists of nine judges, called justices of the Supreme Court; the whole body is called the Supreme Bench; the presiding judge is called the Chief Justice of the United States. These judges are appointed by the President of the United States by and with the consent of the Senate. Their term of office is during good behavior.

§ 364. **State courts.**—Each state has its supreme or appellate court as well as its inferior tribunals. Whether a case is to be tried in a United States court or in a state court will depend upon the kind of a case it is, sometimes upon where the difficulty arose, and in other instances upon citizenship. A case can be tried in a United States court only if it comes under some of the provisions giving that court jurisdiction.

State courts are classified as common law courts, equity courts, probate or surrogate courts, and courts of a minor character established for special purposes.

Common law courts may be either original or appellate, with authority to try civil or criminal cases. Courts of equity have jurisdiction where there is no adequate remedy at law. Testimony in such courts is chiefly in the form of written documents instead of oral evidence, and the judge decides the facts as well as the law. Probate courts have jurisdiction over the estates of deceased persons, with authority to appoint guardians and to hold inquisitions of lunacy. They are sometimes called orphans' courts. Except when otherwise provided, a justice of the peace has but limited jurisdiction over petty criminal offenses and civil suits for trifling sums.

Brown vs. Foster.—At the time appointed for the hearing of the case of Brown vs. Foster the lawyers representing the plaintiff and defendant, and a number of witnesses appear in court. After the preliminaries incident to starting a trial are disposed of, the case is under way.

QUESTIONS FOR DISCUSSION
(Oral)

1. Mrs. S—— who had been in to see the probate judge numerous times was "ordered by the court" to come in again for the purpose of making another report. Who is the Court?

2. Two spectators became very boisterous in the rear of the court room. If you were presiding as judge what disposition would you make of these offenders?

3. You have moved into another state, and taken with you an automobile, title to which has been given to you by a court decree. Does it make any difference whether the decree was obtained in a court of record or not?

4. Congress passes a law which would abolish all federal courts excepting the United States Supreme Court. Does Congress have authority to enact such a law?

5. Suppose this law also proposed to abolish the Supreme Court, what would your answer be?

6. X assaulted and robbed a postman while the latter was on his route. Will X be tried in a state or federal court?

7. Z burglarized the postman's home during the night. In what court will Z be tried?

8. Under the common law, no one could hope to obtain a remedy in a law court unless he could show that the deed of which he complained had actually been committed. Doe was informed by Y, a mischievous character, that he would shoot Doe's dog the next morning at nine o'clock. Could Doe bring a suit to restrain Y from executing his threat?

Chapter LVII

THE TRIAL

Keep in mind these questions when studying this chapter:

1. **What is the formal procedure followed in a trial by jury?**
2. **How is a jury selected?**
3. **How are the witnesses brought into court?**
4. **In what way are the findings of a jury made known?**
5. **What are the rights of the parties after judgment?**

§ 365. **Trial procedure.**—The ordinary steps in a trial by jury are as follows: (1) impaneling (selecting) the jury, (2) opening statements of counsel, (3) presentation of testimony, (4) arguments, (5) charge or instruction to the jury, (6) verdict, and (7) judgment.

§ 366. **The jury.**—Cases involving questions of fact are usually tried before a jury; equity cases are tried before a judge without a jury; criminal cases are tried before a jury if the accused demands a jury trial. Therefore, in a case requiring a jury the first step is the impaneling of the jury.

The jury is selected from the inhabitants of the county; their qualifications are fixed by the statutes. A certain number are summoned to attend court, and from the number summoned, twelve disinterested men are selected to try the case. In a justice of the peace court a case may be tried with six jurymen.

§ 367. **Opening statement.**—The trial is begun by the opening statements to the jury. These statements are merely a brief presentment of the facts which the parties expect to prove, so the jury may have some conception of the controversy, and in order that the evidence will be more intelligible to them as the witnesses are examined. These statements are made by the counsel for the respective parties. Evidence bearing on the case is then heard.

§368. **Evidence.**—After the opening statement, the witnesses for the plaintiff are introduced. Under the early English common law, a party to a suit was not permitted to testify in his own behalf, the theory being that such a party would be so biased that his testimony could not be believed. That rule no longer exists. In the ordinary course of a trial the testimony of the witness is given orally in the form of answers to questions by the lawyer who called him; this is termed the direct examination. He is then cross-examined by the opposing party to discover and bring to the attention of the jury any false or incomplete statements made in the direct examination. After the plaintiff has presented his evidence, the defendant introduces the testimony of his witnesses, following the same procedure as that of the plaintiff.

§ 369. **Subpoena.**—The ordinary method of securing the attendance of a witness in court, if he does not attend voluntarily, is by a subpoena. A subpoena is a writ issued by the clerk of the court commanding the person named to appear and testify at the trial. Refusal to obey such a summons or a refusal to testify when called as a witness subjects the offending party to a fine or imprisonment, or both, for contempt of court.

§ 370. **The verdict.**—When the evidence and arguments have been closed on both sides, the judge instructs the jury in regard to the law and the rules of evidence by which their decision is to be governed. The jury then retires for private deliberation until reaching a decision, called a verdict. The twelve men must unanimously agree, to enable them to render a verdict. However, in some states a certain majority may now return a verdict in a civil action. Formerly, the jurors were confined without food or water until they were starved into unanimity. Now, if they disagree, a new trial with another jury is held, or the judge may set the verdict aside and grant a new trial if the verdict is not justified by the evidence, is irregular, or is contrary to law.

§ 371. **Judgment.**—The suit having been decided by the rendering of a verdict, the judge enters a judgment in accord-

ance therewith. This is the final result of the trial. When a judgment is given in favor of the plaintiff, it is generally to the effect that the defendant shall pay to the former a certain sum of money, and also the costs of the court.

§ 372. **Execution.**—The process by which a judgment is enforced, or executed against the defeated party, is termed an execution. After the judgment is obtained, if the defeated party does not voluntarily pay it, an execution may at once be issued to seize and sell the property of the defendant to pay the costs and satisfy the judgment. If the defendant has no property, over and above the amount which is exempt from execution, then the judgment may fail. Exemptions differ in the various states; they ordinarily consist of clothing, household goods of a certain value, tools of a trade, and even a homestead. The judgment remains in force during the statutory period (See § 49-4), and if the defendant acquires any property within that time it is liable to seizure to satisfy the judgment.

§ 373. **Appeal.**—Either party to a lawsuit, but usually the loser, may, within a certain time after the verdict has been rendered, move for a new trial. The granting of a new trial is entirely within the discretion of the judge. He may set aside the verdict and order a new trial; or he may deny the motion and render judgment. If a new trial is denied, the petitioner may appeal from the judgment of the trial court and take an appeal to a higher court.

When an appeal is taken, a transcript is made of the evidence, called the record. This transcript, with a brief and arguments prepared by the attorneys, is transmitted to the appellate court. The appellate judges may or may not hear oral arguments.

If the appellate court finds that a material error has been committed in the trial court, or that the verdict is unjust, they may reverse the judgment, dismiss the case, or send it back for a new trial. If there is no error in the record, they will affirm the judgment, in which event the case is finally determined. If a new trial is ordered, the same procedure is repeated as in the original trial, with the exception that new pleadings are not necessary.

§ 374. **Brown vs. Foster adjudicated.**—Judgment in the lower court having been awarded in favor of the defendant, the plaintiff took an appeal to the Supreme Court. The Court held that if the plaintiff agreed to make a suit of clothes to the satisfaction of the defendant, he can recover only by meeting the terms of the contract. If, therefore, the other party is to be satisfied, it is within the power of the defendant to reject the finished article as unsatisfactory. The contract permits the defendant himself—and none other—to decide whether he is satisfied. The plaintiff is not relieved from the terms of the contract into which he voluntarily entered and, therefore, cannot recover from the defendant.

QUESTIONS FOR DISCUSSION
(Oral)

1. Black and White are the opposing parties in a trial. Black insists that the lights of his automobile were burning when he collided with White. White disputes this contention. The case is tried before a jury. Who decides on the facts in the case?

2. Could the judge have been dispensed with in the above case? Must there be a jury?

3. What are the ordinary steps in a trial?

4. Smith witnessed the collision of a street car and an automobile. The driver of the automobile took Smith's name and address. A few months later Smith was summoned to appear in court as a witness. He disregarded the summons. May Smith be punished for not appearing?

5. Suppose Smith appears in court, takes the witness stand, but being "peeved" at one of the lawyers refuses to answer any questions. What may then happen to Smith?

6. Distinguish "verdict" from "judgment" in these statements:

(a) "The judge entered a judgment for the plaintiff."
(b) "The jury came in with a verdict for the defense."

7. The plaintiff obtained a judgment against the defendant for $300. What steps will the plaintiff take if the defendant refuses to pay.

8. If the defendant has no property other than his meager household furnishings what will be the result?

9. If after twenty years, defendant falls heir to $50,000, how much will he have left after he has met his legal obligations to the plaintiff in the former case?

10. Allen appealed from the judgment of the trial court and took an appeal to the Supreme Court. Allen was ready to go with his witnesses "to try this case in the Supreme Court." Allen's lawyer told his client that their presence would neither help nor harm their cause. Explain what he meant?

LEGAL MAXIMS

Ignorance of the law excuses no one.

No one is bound to do what is impossible.

No injury is done by things long acquiesced in.

An action is not given to one who is not injured.

If the plaintiff does not prove his case the defendant is absolved.

No one is responsible for inevitable accidents.

A person ought not to be judge in his own cause.

The intention of the parties is the soul of the instrument.

Good faith does not allow us to demand twice payment for the same thing.

That is sufficiently certain which can be made certain.

An evidence of debt found in possession of the debtor is presumed to be paid.

Where two parties are equally in fault the party in possession has the better case.

Time runs against the slothful and those who neglect their rights.

The law does not notice trifling matters.

The law speaks to all with one mouth.

What I cannot do in person I cannot do through the agency of another.

Outward acts indicate the inward intent.

The burden of proof lies on the plaintiff.

An act done by me against my will is not my act.

It is not lawful to build upon one's own land what may be injurious to another.

No one is in duty bound to accuse himself unless before God.

Acts indicate the intention.

Equity looks upon that as done which ought to have been done.

A person boasting of his own wrongdoing is not to be heard.

Constructions of documents are to be made favorably, that the instrument may rather avail than perish.

No man should be condemned unheard.

To conceal is one thing; to be silent another.

Good faith demands that what is agreed upon be done.

The custom of the place is to be observed.

The principal part of everything is the beginning.

The law sometimes sleeps, but never dies.

Fraud and deceit should excuse no man.

The law helps persons who are deceived, not those deceiving.

He who comes into court must come with clean hands.

Many promises lessen confidence.

A thing void in the beginning does not become valid by lapse of time.

When the law presumes the affirmative, the negative is to be proved.

The proof lies upon who affirms, and not upon him who denies.

Equity regards the spirit and not the letter.

Equity looks at the intention of the parties, and not at the actual words employed in any transaction.

Every simple contract must be supported by a valuable consideration.

The execution of the law works no injury.

False in one thing, false in all.

He who flies from justice acknowledges himself a criminal.

He who conceals a fraud perpetrates one himself.

That is unnecessarily done by many words which is capable of being done by fewer.

A general rule must be generally understood.

He who seeks equity must do equity.

In similar cases, the remedy should be similar.

In all criminal charges the proofs should be as clear as day.

An accused person is always entitled to receive the benefit of the doubt.

The law has regard to things near at hand, and not to those remote.

The strictest good faith must be exercised in partnership transactions.

In wills we seek more especially for the testator's intention.

One wrong does not justify another.

It is to the advantage of the State that there should be a limit to lawsuits.

A benefit is not conferred upon an unwilling recipient.

He who is first in point of time is preferred in law.

He who receives the advantage ought also to suffer the burden.

Let him be deceived who wishes to be deceived.

Everyone experienced in his own calling is to be believed.

You cannot lawfully condone an offense by receiving back stolen property.

That which a people has last ordained shall be the established law.

A thing done between two persons ought not to injure another.

A point judicially decided is taken to be correct.

One should know with whom he contracts.

In obscure constructions the law follows that which is least obscure.

Every presumption of the law must be in aid of justice.

He who acts through another acts through himself.

So enjoy your own rights as not to injure those of another.

Where the law is most strictly administered, it sometimes causes the greatest wrong.

Withholding the truth suggests falsehood.

The execution of the law does not work a legal injury.

He who considers only the mere wording of a document goes but skin deep into its meaning.

He proves nothing who proves too much.

Let him who sins when drunk be punished when sober.

Gross negligence is equivalent to intentional wrong.

He who willingly confesses should be dealt with more leniently.

The law cares not about mere trifles.

Debts follow the person of the debtor.

An extravagant debtor is condemned in the eye of the law.

Sunday is not a day for judicial proceedings.

A deceitful person is skilled in general matters.

Where there is a legal right there is a remedy.

Words of deeds or grants are to be taken most strongly against the grantor.

No man can make another his debtor against his will.

The loser must defray the costs of a successful litigant.

Laws come to the help of the vigilant, not to the sleepy.

In criminal cases the intention and not the result is regarded.

Regard is to be had, not to what is said, but to what is done.

Odious and dishonest things are not to be presumed in law.

A duty should be injurious to no one.

Every presumption is made against a wrongdoer.

Custom is the best interpreter of law.

One eyewitness is worth more than ten hearsay.

The condition of one in possession is the more preferable.

Caution is better than cure.

The law does not enforce impossibilities.

What is written endures; things spoken speed away.

An evil custom ought to be abolished.

Justice is better when it prevents rather than punishes with severity.

He who spares the guilty threatens the innocent.

Many have known many things; no one has known everything.

No one can give what he has not.

It is one thing to possess; it is another to be in possession.

One alleging his own infamy is not to be heard.

Let the buyer beware. *Caveat emptor.*

A day begun is held as complete.

Gathered fruits are not part of the farm.

A simple proposition needs no exposition.

The words of the law must not be departed from.

A personal action dies with the verson.

The act itself does not make a man guilty, unless his intention be so.

Judges do not decide questions of fact; the jury do not decide questions of law.

Equity looks upon that as done which ought to have been done.

Equity can not alter the law of the land, but follows it.

An ambiguity is taken against the party using it.

Water flows and should be allowed to flow.

He is clear of blame who knows, but can not prevent.

A right can not arise from a wrong.

Ratification is equal to command.

Two can not possess the whole of one thing in its entirety.

Equity imputes an intention to fulfill an obligation.

From what goes before and what follows, the best interpretation is arrived at.

The execution of the law works no injury.

What is expressed makes what is implied to cease.

A trust is the obligation of one's conscience to fulfill the intention of another.

Let a madman be punished by his madness alone.

This indeed is hard, but it is the written law.

The punishment should be in the same place as the guilt.

That is certain which can be reduced to a certainty.

Not to be and not to be legally proved are the same thing.

In criminal acts the intention is to be sought or examined rather than the result.

In case of equal fault the position of the defendant is the better.

Judges are not compelled to give reason for their opinions, judgments or sentences.

It is for the judge to administer, not to make the law.

When the law gives a man anything, it gives him that also without which the thing itself can not exist.

When anything does not operate in the way one intends, let it operate as far as it can.

He who is silent appears to consent.

That which was void from its commencement does not improve by lapse of time.

The Constitution of the United States forbids excessive bail or cruel punishment.

GLOSSARY OF LEGAL TERMS

(The definitions of the following legal terms apply to words and expressions not defined elsewhere in the text. Refer to the index for other terms.)

Abrogate, repeal; annul or destroy; abolish entirely.

Acceptance, (1) an accepted bill; also (2) the assent by the person on whom a bill is drawn to pay it when due.

Acceptor, one who "accepts" an order or a bill of exchange.

Accused, a person charged with a criminal offense.

Acknowledgment, (1) admission of the execution of a writing made before a competent officer; (2) the formal certificate made by an officer.

Acquittal, judicial finding of not guilty.

Action, the legal right to bring or maintain a suit at law.

Adjudication, a judicial decision or sentence.

Administrator, person appointed by the court to take charge of the estate of a deceased person who died intestate.

Adult, one who has reached full legal age.

Affidavit, a voluntary sworn statement in writing.

Affirm, a solemn declaration to tell the truth, under a penalty of perjury.

Alias, Latin word meaning another name; an assumed name.

Alibi, elsewhere; in another place when a wrongful act was committed.

Alien, citizen of one country residing in another.

Alienate, to transfer title to real property by a legal conveyance.

Alimony, allowance made to a woman living apart from her husband.

Allegation, statement of a fact in a legal proceeding.

Alteration, change or substitution of one thing for another.

Ambiguity, doubtfulness and uncertainty in regard to meaning.

Ancestor, one from whom an estate has descended.

Annuity, a sum payable yearly for a certain or uncertain period.

Annulment, act of making void.

Answer, written statement of defendant's claim, as to the facts in the case.

Ante-date, date prior to the true one; an earlier date.

Arbitration, the trial and determination of a controversy by persons chosen by the parties to the dispute.

Arraign, accuse; impeach; answer to the charge of an indictment.

Assault, attempt to do hurt to another by physical violence.

Assent, consent; concur.

Assets, property available for payment of debts.

Assign, transfer of property or a right to another.

Assignee, one to whom property has been transferred.

Attachment, legal process by which property is taken into custody pending a suit.

Attest, bear witness by a signature.

Attorney, one legally appointed to act for another.

Avoid, make void; annul.

Award, the decision of arbitrators.

Bail, security given for the appearance of a person in court.

Bankrupt, one who has been judicially declared unable to meet his liabilities.

Battery, unlawful beating of another.

Bequest, gift of personal property by will.

Bilateral, a contract executory on both sides.

Bona Fide, in good faith; without deceit or fraud; genuine.

Bond, an instrument under seal, in which a person binds himself to pay to another a sum of money.

Breach, in contracts, the violation of an agreement or obligation.

Brief, written or printed arguments or authorities furnished by a lawyer to a court.

Burglary, breaking open and entering a dwelling with the intent to commit a felony.

Case, statement of facts upon which an action in court is based.

Chattel, any article of personal property.

Civil, distinguished from criminal or political.

Client, one who employs a lawyer—to represent him in legal matters.

Code, compilation of laws by public authority.

Codicil, addition to a will, and modifying it in some respects.

Collateral, security (usually stocks or bonds) given for borrowed money.

Collusion, secret agreement between two or more persons designed to obtain an object forbidden by law.

Competency, legal power; adequacy or ability.

Compromise, settlement reached by mutual concessions.

Consanguinity, relationship by blood.

Consignee, one to whom goods are shipped.

Conveyance, act by which title to real property is transferred.

Corporeal, tangible property, as a book or a boat.

Covenant, promise contained in a sealed instrument; solemn compact.

Coverture, relating to the legal rights of a woman during marriage.

Crime, violation of human law; an omission of a duty or the commission of an act forbidden by law.

Curator, a legally appointed custodian of property or persons.

Custody, care and safe-keeping of property.

Damage, compensation which the law awards for a wrong or injury done.

Deceit, device or false representation by which one person misleads another to his injury.

Decree, judgment or decision of a court.

Default, non-performance of a duty or obligation.

Defendant, person against whom a suit is brought.

Defense, denial of the truth of the complaint.

Demur, raise an objection; take exceptions.

Deposition, testimony taken down in writing, under oath.

Descent, hereditary succession of an estate.

Disability, incapable of performing a legal act.

Disaffirm, repudiate; refuse to confirm.

Divorce, dissolution of the marriage ties.

Domicile, place where a man has his home.

Easement, the right which one person has to use the land of another for a special purpose.

Emblements, growing crops which have been sown or planted, and which the tenant may remove after the expiration of his term.

Enact, make into a law; establish by a legal act.

Equitable, just; fair; right; reasonable.

Escrow, a deed, bond, or other written document held in trust by a third person.

Estate, an interest in property.

Estoppel, a rule of law which precludes a man from denying certain facts in consequence of his previous conduct or admissions.

Eviction, the expulsion of an occupant of real property.

Evidence, proof; testimony.

Execution, a writ which authorizes an officer to carry into effect the judgment of the court.

Executor, person named by the maker of a will to carry out its provisions.

Ex Parte, upon or from one side only.

Extradition, the surrender by one government to another of a person charged with a crime.

Factor, an agent appointed to sell goods on commission.

Fiduciary, involving a relation of trust or confidence.

Foreclosure, proceeding by which the right of the mortgagor to redeem his property is extinguished.

Forfeiture, loss of some right or privilege.

Franchise, a right or privilege conferred by law.

Guardian, one who has the care of another.

Garnishment, a process whereby property is attached.

Heir, one who inherits by right of relationship.

Indemnity, something given or promised to save another from loss or damage.

Indenture, a writing containing a contract.

Indictment, formal charge preferred by a grand jury.

Infant, any person not of full legal age.

Injunction, judicial order or decree forbidding the doing of a certain act.

Insolvency, state of being unable to pay one's debts.

Instrument, a written document.

International Law, customs, usages, and treaties observed by nations in their intercourse with one another.

Intestate, one who dies without making a valid will.

Invalid, void; of no legal effect.

Judgment, decree or sentence of a court.

Legacy, gift of personal property by will.

Legal, based upon law.

Legatee, one to whom a legacy is given.

Levy, taking possession of property to satisfy a judgment.

License, permit to do an act which would otherwise be unlawful.

Lien, a right to retain another's property as security for a debt or claim.

Liquidated damages, amount agreed upon in advance by the parties to a contract, to be paid in case of a breach.

Litigation, a suit at law; a judicial contest.

Malfeasance, wrongful doing of some act.

Malice, ill-will towards some person.

Mandamus, a writ issued by a court directing the performance of certain acts.

Merger, the absorption of one contract or interest in another.

Misrepresentation, a false and fraudulent statement.

Negligence, the omission to do what a reasonable, prudent person would do, or doing what such a person would not have done.

Nominal damages, a trifling sum given for the violation of a right where no actual loss has resulted.

Nuisance, something which wrongfully disturbs another in the enjoyment of his own.

Obligation, a legal duty.

Ordinance, rule or law passed by the legislative body of a city.

Ouster, ejection; dispossession.

Perjury, willful false testimony under oath in a judicial proceeding.

Parol, expressed orally; not in writing.

Parole, conditional pardon.

Per Se, in itself.

Plaintiff, one who brings an action in a court.

Pettifogger, an inferior or unprincipled lawyer.

Precedent, authority followed in courts of justice; a previous decision in a similar case.

Probate, a court having jurisdiction over estates.

Prosecute, proceed against by legal means.

Prima Facie, at first view; apparently true.

Proxy, substitute; person authorized to act for another.

Ratification, confirming a contract which was executed without authority.

Realty, same as real property.

Receiver, person appointed by a court to take charge of property pending litigation.

Release, surrender or relinquishment to another of a right, claim, interest, or estate.

Remedy, legal means employed to enforce a right or redress a wrong.

Replevin, an action to recover possession of property unlawfully detained.

Rescission, canceling or annuling a contract or deed.

Revocation, the annulment or cancellation of an instrument, act, or promise.

S. S., abbreviation for the Latin word scilicet, meaning, to wit; namely; that is to say.

Sentence, penalty pronounced upon a person convicted of a crime.

Severance, the removal of crops or fixtures from land.

Subpoena, a writ commanding a person to appear as a witness.

Suit, the prosecution of some claim in a court of justice.

Summons, a notice to a person to appear in court.

Technicality, "a quibbling nicety."

Testimony, proof; evidence; statements of witnesses.

Trespass, an unwarranted invasion of another's right or liberty.

Trustee, one who holds property for the benefit of another.

Ultra Vires, beyond the power; exceeding authority.

Unilateral, one-sided, applied to contracts where only one promise is still unperformed.

Usury, taking of more than the legal rate of interest.

Verdict, decision rendered by a jury.

Versus, against; abbreviated vs.

Venue, the place where the trial is held.

Waiver, voluntary surrender or relinquishment of a right or privilege.

Waste, damage or destruction done or permitted to property by a tenant.

Witness, (1) a person who gives evidence in court; (2) one who sees a document executed and signs his name thereto.

Writ, a formal written command issued from a court of law.

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